S. HRG. 101-649

CIVIL RIGHTS ACT OF 1990

HEARING

BEFORE THE

COMMITTEE ON LABOR AND HUMAN RESOURCES UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

S. 2104

TO AMEND THE CIVIL RIGHTS ACT OF 1964 TO RESTORE AND STRENGTHEN CIVIL RIGHTS LAWS THAT BAN DISCRIMINATION IN EMPLOYMENT, AND FOR OTHER PURPOSES

FEBRUARY 23, 27, MARCH 1, AND 7, 1989

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CIVIL RIGHTS ACT OF 1990

FRIDAY, FEBRUARY 23, 1990

U.S. SENATE,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC.

The committee met, pursuant to notice, at 9:34 a.m., in room SD-430, Dirksen Senate Office Building, Senator Edward M. Kennedy, (chairman of the committee) presiding.

Present: Senators Kennedy, Metzenbaum, Simon, Hatch, Kassebaum, Jeffords, and Thurmond.

OPENING STATEMENT OF SENATOR KENNEDY

The CHAIRMAN. The committee will come to order.

Last year, a series of unfortunate rulings marked an abrupt and unwarranted departure from a generation of vigilance by the U.S. Supreme Court in protecting civil rights. These decisions have opened significant gaps in the laws that prohibit racism, sexism, and other flagrant and other types of ingrained bias in our society.

Fortunately, none of those decisions is grounded in the Constitution. They each involve interpretations by the U.S. Supreme Court of statutes enacted by Congress. When the Court misinterprets the legislative intent of Congress, Congress can correct the mistake by enacting a new law. And that is what we intend to do.

The Civil Rights Act of 1990 is designed to overturn the Court's rulings of 1989 and restore and strengthen our basic civil rights laws. The act is bipartisan, and I have joined Senators Jeffords, Senator Metzenbaum, and 35 other Senators so far in sponsoring it in the Senate.

Four decisions by the U.S. Supreme Court last year are at the heart of the legislation.

In the *Patterson* case, the Court rewrote an 1866 civil rights law. It construed the century-old statute so narrowly that millions of workers on the job are now no longer protected from being fired, denied promotion, or harassed in the workplace because of racial prejudice.

At a single stroke, the Court nullified the only Federal antidiscrimination law applicable to 11 million workers in the nearly 4 million firms with fewer than 15 employees.

Already the *Patterson* decision has caused the dismissal of more than 100 claims of race discrimination in the past 8 months, and it should be overruled by Congress.

In a second decision, in the *Wards Cove* case, the U.S. Supreme Court effectively overruled the unanimous decision on job discrimi-

nation by Chief Justice Burger in 1971 in the landmark case of *Griggs* v. *Duke Power.*

It is no surprise that the forces of opposition to civil rights, including the Reagan administration and many in the Bush administration—but I hope not the President himself—have dug in their heels in an attempt to prevent Congress from restoring the *Griggs* rule.

In literally hundreds of cases in two decades of litigation, the *Griggs* rule became the cornerstone of America's commitment to ending race and sex discrimination on the job. Time and again, the rule has been used wisely and well in so-called "disparate impact" cases to root out the subtle and not-so-subtle practices of discrimination that kept minorities and women from participating fully and fairly in our economy.

In *Wards Cove*, the U.S. Supreme Court unwisely and unfairly shifted the burden of proof in such litigation from employers to employees. By shifting the burden, the U.S. Supreme Court has made it far more difficult and expensive for victims of discrimination to challenge the barriers that they face. Chief Justice Burger was right in *Griggs* in 1971, and Congress should restore the *Griggs* rule in 1990.

Two decades of experience are clear: The *Griggs* rule does not lead to quotas, and never has. It is a mockery of civil rights and the fundamental principle of equal justice under law for opponents of this legislation to raise the false hue and cry of quotas.

The third decision at issue is *Martin* v. *Wilks*. In that case, the U.S. Supreme Court held that consent decrees settling job discrimination cases may be reopened in future lawsuits, even by people who sat on their hands while the Court considered the decree.

Since that decision, numerous longstanding Court decrees have been challenged in new lawsuits in cities across America.

Our legislation proposes fair procedures for interested persons to challenge decrees in appropriate cases, while limiting endless litigation and assuring that fairly settled cases stay settled.

In a fourth objectionable decision, the *Lorance* v. *AT&T Technologies*, the Court held that employees harmed by discriminatory seniority plans must bring their lawsuits when the plans are adopted, which may well be years before the employees learn that they are harmed by the plan. Our bill will overrule this decision and permit employees to file their lawsuits at the time they are adversely affected by a discriminatory plan.

Finally, the legislation contains a number of provisions to fill additional gaps in our antidiscrimination laws resulting from other U.S. Supreme Court decisions and to ensure fair and effective civil rights enforcement.

For example, victims of sexual harassment on the job currently have no effective Federal remedy. The act will close this serious loophole by granting victims of intentional discrimination the right to recover compensatory damages. In particularly flagrant cases, punitive damages will be available as well.

The committee has scheduled a series of hearings on this important legislation. Today we will hear an overview of the Court's decisions on the key issues involved in the legislation.

The second hearing, on February 27, will address the provisions dealing with intentional discrimination.

The third hearing, on March 1, will concentrate on the *Wards Cove* case and the disparate impact issue.

Our final hearing, on March 7, will deal with the *Martin* v. *Wilks* decision and other procedural reforms.

I am pleased that the Bush administration has abandoned its initial wait-and-see posture. That position was untenable, and the administration is now supporting legislation to overrule the *Patterson* and *Lorance* cases. But the administration cannot stop there, or its response will be inadequate. Stronger, more comprehensive legislation is needed to fill the large gaps created in the Nation's civil rights laws by the U.S. Supreme Court decisions.

I hope the administration is serious in its commitment to ending discrimination, and I hope that it will soon join the broad bipartisan coalition in Congress that is committed to enacting the Civil Rights Act of 1990.

There are many distinguished witnesses today, the committee and I will look forward to hearing their testimony.

But first we will hear from Senator Hatch.

Opening Statement of Senator Hatch

Senator Hatch. Thank you, Mr. Chairman.

All of us agree that one of the most important functions of government is to guarantee equal opportunity under the law. Discrimination on the basis of race, ethnicity, religion, handicap, and gender is immoral and is contrary to the most fundamental ideals of our country.

Over the past 25 years, a rich and broad mosaic of Federal civil rights laws, ranging from employment, public accommodations, Federally aided programs, to housing, institutionalized persons, and more, have been put in place. I have no doubt that more needs to be done to combat the evil of discrimination in our society, and I hope that we can work together to achieve this important goal.

The Civil Rights Act of 1990 is designed to overturn several U.S. Supreme Court cases. In fact, it overhauls two Federal statutes, throws out years of U.S. Supreme Court and Appellate Court decisions, and conflicts directly with the several core concepts of American jurisprudence and justice.

Some areas of the legislation do have merit. For example, I have concluded that section 1981 should be amended to ban racial discrimination in the terms and conditions of contracts, as well as in their formation and enforcement. In other words, I agree with Mrs. Patterson. Thus, the *Patterson* case, in my view, should be overturned.

Moreover, I believe that title VII should be amended so that persons can challenge allegedly discriminatory seniority systems at the time a person is aggrieved by such a system. Thus, the *Lorance* decision should, in my view, be overturned.

I have introduced legislation, prepared and supported by the administration, which achieves these salutary objectives, and we have worked with the administration to see what can be done in this area.

On the other hand, Mr. Chairman, I don't believe that we have to overhaul the American legal system to assure equality. We don't have to award some groups more legal rights than others to guarantee the civil rights of all Americans. We don't have to make quotas the only legal employment policy in order to provide equal opportunity.

Some of the major problem areas in this bill I would like to list as follows:

First, the bill is a litigation bonanza for lawyers. Instead of eliminating endless litigation as our chairman has said, this bill is going to cause litigation all over this country like never before.

Second, sections 3 and 4 of the bill so dramatically change title VII of the Civil Rights Act that the only way to avoid being sued is to house solely by numbers, to use quotas for hiring and promotion. Now, some think that that always comes up. There is a good reason for it. There is always some attempt to push toward quotas or proportionality in the law. And thus far, that hasn't been adopted by the law.

Third, under sections 3 and 4 of this bill, hiring the most qualified applicant may no longer be an acceptable defense to a charge of discrimination. We have to think that through. If that is where we want to go, maybe the Congress will decide to do that. I don't think so. There ought to be a right to hire the most qualified applicant.

Fourth, sections 3 and 4 of the bill conflict with the fundamental principle that one is innocent until proven guilty. The bill, I think for the first time, will shift the burden of proof from the plaintiff to the defendant in disparate impact cases. And I think it does so in ways that really are detrimental to justice.

Fifth, section 6 conflicts with the fundamental principle—and it is fundamental not just in our country but almost everywhere where you have fundamentally good laws—it conflicts with the fundamental principle that every American should have the same right to his or her day in court.

Sixth, this bill goes so far that it would even overturn a Justice Brennan decision as to what constitutes intentional discrimination.

Mr. Chairman, I do want to compliment you for agreeing to hold 4 days of hearings on this matter. This is an important matter, and we have to examine it in an important way from both sides.

I look forward to working with you on the other days of the hearings to assure that we have the benefit of all the available expertise in this matter. S. 2104 is an extremely complicated bill; it is not a simple bill. It will affect millions of Americans all over this country. We must not legislate by label, but take all the steps necessary, to understand the legal ramifications of what is being proposed here.

Anybody who thinks that this is a simple bill hasn't read it. Anybody who thinks that the issues involved here are simple hasn't considered them. And it may be that this bill will be passed in its present form, but I think we certainly have to exhaustively examine it to make sure that we are not passing something that is going to be tremendously detrimental to our society as a whole.

Now, I am committed to civil rights, and I want to have these bills also be committed to the civil rights of everybody. And I think

you'll find that some aspects of this bill, instead of providing for the civil rights of everybody, provide for different rights for some people than others.

But be that as it may, we will look at it. I look forward to hearing the testimony of our expert witnesses here today. And we have some very good people on both sides of this issue, and I am going to listen very carefully and just see what both sides have to say about this matter. I have inestimable respect for all the witnesses here today as well, and I want to welcome all of them to our committee. I look forward to listening to you and hearing from you and perhaps asking a few question.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

[The prepared statement of Senator Hatch follows:]

PREPARED STATEMENT OF SENATOR HATCH

Senator HATCH. Mr. Chairman, all of us agree that one of the most important functions of government is to guarantee equal opportunity under the law. Discrimination on the basis of race, ethnicity, religion, handicap, and gender is immoral and contrary to the most fundamental ideals of our country.

Over the past 25 years, a rich and broad mosaic of Federal civil rights laws, ranging from employment, public accommodations, federally aided programs, to housing, institutionalized persons, and more, have been put in place. I have no doubt that more needs to be done to combat the evil of discrimination in our society and hope that we can work together to achieve this important goal.

The Civil Rights Act of 1990 is designed to overturn several recent U.S. Supreme Court cases. In fact, it overhauls two Federal statutes, throws out years of U.S. Supreme Court and appellate Court decisions, and conflicts directly with several core concepts of American justice.

Some areas of the legislation have merit. For example: I have concluded that section 1981 should be amended to ban racial discrimination in the terms and conditions of contracts, as well as in their formation and enforcement. Thus, the *Patterson* case, in my view, should be overturned. Moreover, I believe that title VII should be amended so that persons can challenge allegedly discriminatory seniority systems at the time a person is aggrieved by such a system. Thus, the *Lorance* decision should, in my view, be overturned. I have introduced legislation, prepared and supported by the administration, which achieves these salutary objectives.

On the other hand, Mr. Chairman, I don't believe we have to overhaul the American legal system to ensure equality. We don't have to award some groups more legal rights than others to guarantee the civil rights of all Americans. We don't have to make quotas the only legal employment policy in order to provide equal opportunity.

The major problem areas in the bill are as follows:

1. This bill is a litigation bonanza for lawyers.

2. Sections 3 and 4 so dramatically change title VII that the only way to avoid being sued is to hire solely by numbers, to use quotas for hiring and promotion.

3. Under Sections 3 and 4 of this bill, hiring the most qualified applicant may no longer be an acceptable defense to a charge of discrimination.

4. Sections 3 and 4 of the bill conflict with the fundamental principle that one is innocent until proven guilty. The bill will shift the burden of proof from the plaintiff to the defendant in disparate impact cases.

5. Section 6 conflicts with the fundamental principle that every American should have the same right to his or her day in court.

6. This bill would even overturn a Justice Brennan decision as to what constitutes intentional discrimination.

Mr. Chairman, I want to compliment you for holding 4 days of hearings on this bill. I look forward to working with you on the other days of hearings to ensure that we have the benefit of all available expertise. S. 2104 is an extremely complicated bill that will affect millions of Americans. We must not legislate by label but take all the steps necessary to understand the legal ramifications of what is being proposed.

ADDENDUM TO SENATOR HATCH'S OPENING STATEMENT

In the *Watson* v. *Fort Worth Bank and Trust* case, decided in1988, Justice O'Connor warned us about the real risk of imposing quotas on the American people if the title VII disparate impact theory is misused. In that case, the U.S. Supreme Court actually extended the application of the disparate impact theory to subjective employment practices, a great victory for civil rights plaintiffs. She then went on to express the same concern I have raised in my opening statement:

> "We agree that the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures. It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance. It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces. Congress has specifically provided that employers are not required to avoid 'disparate impact' as such;" citing a specific provision of title VII (Section 703(j)) . . . "Preferential treatment and the use of quotas by public employers subject to title VII can violate the Constitution, and it has long been recognized that legal rules leaving any class of employers with 'little choice' but to adopt such measures would be 'far from the intent of title VII,'" quoting Justice Blackmun. *Albemarle Paper Co.*, 422 U.S., at 449, 95 S.Ct., at 2390 (Blackmun, J., concurring in judgment)."

Thus, Justice O'Connor acknowledged that:

> "Extending disparate impact analysis to subjective employment practices has the potential to create a Hobson's choice for employers and thus to lead in practice to perverse results. If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially

> catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met. Allowing the evolution of disparate impact analysis to lead to this result would be contrary to Congress' clearly expressed intent. . . . We recognize, however, that today's extension of [the disparate impact] theory into the context of subjective selection practices could increase the risk that employers will be given incentives to adopt quotas or to engage in preferential treatment. Because Congress has so clearly and emphatically expressed its intent that title VII not lead to this result, 42 U.S.C. Section 2000e-2(j), we think it imperative to explain in some detail why the evidentiary standards that apply in these cases should serve as adequate safeguards against the danger that Congress recognized."

And then Justice O'Connor, in her four member plurality opinion, laid out the standards for proving a disparate impact case. These are the very same standards adopted by a majority of the Court, with the addition of Justice Kennedy, in *Wards Cove.*

In *Wards Cove*, the Court held:

—In order to use statistical evidence to establish a prima facie case of disparate impact, you must make a comparison between the percentage of qualified minorities in the relevant labor pool and the percentage of minorities in the job in question. To compare the percentage of minorities in an employer's unskilled jobs to their percentage in skilled jobs, is "nonsensical," as Justice White said.

—A plaintiff must then demonstrate that the disparity results from the employment practice(s) he or she is challenging, not merely assert that the employer's entire set of hiring practices results in an imbalance. This seems an obvious requirement for a prima facie case. As Justice White said, "To hold otherwise would result in employers being potentially liable for 'the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces.' "

—Once the plaintiff makes a prima facie case by showing a relevant disparity resulting from the employer's practice(s), the employer has the burden of producing evidence of a legitimate reason for the employment practices in question.

—That is, the employer's burden is to produce evidence that its challenged practice(s) serves in a significant way legitimate employment goals; the employer need not produce evidence that the practice is necessary or essential to effective job performance. The latter is an impossible burden for employers to meet. It would cause an erosion of standards and force employers to adopt quotas in order to avoid liability.

—The burden of persuasion in these cases remains with the plaintiff—an elementary part of how our civil justice system works. The plaintiff under title VII must prove discrimination has occurred, the defendant is not required to prove his innocence, i.e. that he has not discriminated. Thus, once the employer produces evidence of the legitimacy of the practice in

question, the plaintiff must show that the proffered business justification is a pretext or otherwise not legitimate. This is how the Federal rules of evidence operate. Federal Rule of Evidence 301.

—Even then, if the plaintiff cannot prevail on the business justification question, he or she may still prevail by coming forward with alternative employment criteria that reduce the disparate impact of existing employment practices. But these alternatives must be equally effective in serving the employer's legitimate employment goals.

—There is nothing unusual about this. It has all been said by the Court before. E.G. *New York Transit Authority* v. *Beazer*, 440 U.S. 568, 587 n. 31 (1979); *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 413 and n. 7, 425 (1975); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431, 432 (1971); See also *Watson* v. *Ft. Worth Bank and Trust*, 108 S.Ct. 2777, 2787–2791 (1988); *NAACP* v. *Medical Center*, 657 F.2d 1322, 1334–1336 (3rd Cir. 1981).

These standards reflect prior U.S. Supreme Court precedent in each particular, including *Griggs*, not a departure from precedent. They implement the disparate impact standard in a sensible way, they do not overturn it.

The CHAIRMAN. Senator Metzenbaum.

OPENING STATEMENT OF SENATOR METZENBAUM

Senator METZENBAUM. Thank you, Mr. Chairman.

Today marks the beginning of what I hope will be a relatively short process in the Senate to enact the Civil Rights Act of 1990. I am pleased to have played an active role in crafting this legislation, under the leadership of Senator Kennedy and Senator Jeffords.

Last year, in a series of decisions interpreting our basic civil rights statutes, the U.S. Supreme Court slammed the door in the face of millions of American women and minorities seeking equal employment opportunities. In case after case, the Court, by paper-thin majority votes, repudiated longstanding precedent to deny protection to women and minority workers. Those cases were wrong. That is why we are here today.

Since 1954, when the U.S. Supreme Court issued its landmark *Brown* v. *Board* decision, women and minorities have been able to look to the U.S. Supreme Court as a safe haven for the protection of civil rights.

I am saddened that now, some 35 years later, that safe haven for women and minorities has been closed. Unfortunately, the new appointees to the U.S. Supreme Court seem to be living up to their advance billings in this important area.

The Civil Rights Act of 1990 sets the record straight. Enactment of this legislation will send a resounding message to the Court and to the public that we will not tolerate a retreat on civil rights. Instead, we must quicken the pace of reform to stop discrimination and harassment in the workplace. Equal employment opportunity is more than just a moral imperative, it is an economic necessity. We as a Nation cannot afford to exclude any workers as we strive

to remain competitive. Irrational barriers to employment and promotion cannot be tolerated.

Earlier this year, Senator Jeffords and I introduced S. 1261, the Fair Employment Reinstatement Act, to overturn the *Wards Cove* v. *Atonio* decision. I am pleased that Sections 3 and 4 of the Civil Rights Act of 1990 incorporate fully the provisions of the Fair Employment Reinstatement Act.

I am looking forward to reviewing the testimony from the witnesses here today. This bill will receive a full and fair hearing. If technical problems are raised, I am confident that they can be worked out.

But we must not lose sight of the bigger picture. We must tell the U.S. Supreme Court in no uncertain terms that turning back the clock on civil rights protection is unacceptable. Quick enactment of the Civil Rights Act of 1990 will send that clear message.

The CHAIRMAN. Thank you very much.

Along with Senator Metzenbaum, another architect of this legislation is the Senator from Vermont.

Senator Jeffords.

OPENING STATEMENT OF SENATOR JEFFORDS

Senator JEFFORDS. Thank you very much, Mr. Chairman. I commend you for having these prompt hearings. I am pleased that since its introduction 2 weeks ago, there does seem to be general agreement that at least two of last summer's decisions, *Patterson* and *Lorance*, must be remedied. I hope that the testimony we receive today and in the weeks to come will help build upon and expand that consensus.

I think such consensus must find that consent decrees should have a reasonable expectation of finality, that mixed-motive discrimination is not to be condoned, and that it is an employer's burden to demonstrate why an employment practice that results in a disparate impact is justified.

Now, Mr. Chairman, my views are well known on this subject, and I look forward to the witnesses.

The CHAIRMAN. Thank you very much.

Senator Simon, a long-time supporter of this legislation.

OPENING STATEMENT OF SENATOR SIMON

Senator SIMON. Thank you, Mr. Chairman. I thank you for moving quickly on this. I think it is absolutely essential that we make clear opportunity, freedom and justice are going to grow in our society.

What I find particularly disheartening is the Alaska fishery case, better known as the *Wards Cove* case, where clearly the burden is shifted in a totally unreasonable way toward the plaintiffs. You cannot use statistics, for all practical purposes, as a result of the *Wards Cove* case. That really ultimately is going to have a devastating effect on seeing to it that justice and opportunity are part of our society.

The one decision that is not included that I hope we can move on separately in this legislation is the *Richmond* set-aside case. And there, that has had an immediate impact. Communities and gov-

ernmental entities around this Nation that probably didn't have much heart in the set-aside in the first place now find an excuse for not having a set-aside. I hope we can, in addition to moving on this legislation, move on legislation that deals with the *Richmond* case also.

I thank you again, Mr. Chairman, for holding this hearing.

The CHAIRMAN. We will take note that you have introduced legislation that has been referred to the Government Affairs Committee on that particular issue, and as I understand, they are going to move forward with that bill.

Senator SIMON. That is my understanding, and I hope they will.

The CHAIRMAN. Senator Thurmond.

OPENING STATEMENT OF SENATOR THURMOND

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Chairman, I would like to commend you for holding this first in the series of hearings that will examine recent U.S. Supreme Court decisions relating to discrimination. I am confident that the members of this committee will benefit from the testimony that will be presented by the witnesses appearing before us today.

The Department of Justice, acting on the direction of President Bush, has monitored the impact of decisions concerning discrimination that were handed down by the U.S. Supreme Court during the late term of court. Based on its findings, the department has made appropriate recommendations in regard to these cases.

I am in agreement with the recommendations of the Department of Justice and am an original cosponsor of the legislation that was introduced yesterday by Senator Dole, Senator Hatch, and others, which proposes to strengthen laws to prevent discrimination in the workplace.

Mr. Chairman, the Bush administration is firmly committed to eliminating employment discrimination. Attorney General Thornburgh has stated that, and I quote, "Discrimination is wrong no matter at whom it is directed." I am sure that each of us strongly agrees with this principle.

Much progress has been made in our Nation to ensure that any individual will not be discriminated against in employment opportunities or adversely affected on the basis of race, color, religion, sex, or national origin, in keeping with the precepts of Federal statutes.

I am looking forward to hearing the perspectives that will be presented today concerning the status of discriminatory practices in our country. While my schedule will not permit me to remain for the entire hearing, I will review the testimony that is presented with interest.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. Thank you very much.

I want to point out just at the outset, that this legislation which the committee is drafting, in its protections, doesn't apply to the Congress. This is a point that sometimes has been brought up. It was brought up with the ADA legislation as well. And it is certainly my intention to have it apply to the Congress as well. Legisla-

tion to achieve that end has been introduced and is before the Government Affairs Committee.

So we will work with the members of the Government Affairs Committee to try to ensure that whatever ultimately results from this committee will also be applicable to the Congress. We did that with regards to the ADA which was reported out of this committee as well.

We are delighted to welcome our first panel: Mr. William Coleman is among the most distinguished and accomplished lawyers our country has ever known. A member of the Harvard Law Review, he went on to clerk for Justice Frankfurter, served as Secretary of Transportation in the Ford administration, and is currently a senior partner in O'Melveny and Myers here in Washington, and one of the most experienced and highly respected advocates before the U.S. Supreme Court. We look forward to his testimony.

Judge Shirley Hufstedler left her position as one of America's most respected jurists on the U.S. Court of Appeals for the Ninth Circuit to serve with great distinction as Secretary of Education in the Carter administration. She is currently a partner in a Los Angeles firm, Hufstedler, Miller, Kaus and Beardsley. We are very pleased that she has taken time out of her schedule to be with us today.

Ray Marshall is no stranger to this hearing room. He was the highly regarded Secretary of Labor during the Carter administration, and is currently a professor at the LBJ School of Public Affairs at the University of Texas at Austin. We are especially pleased to have him back to the committee.

Let me at the outset express my appreciation for all of our panelists. I think we have an extraordinarily distinguished group of men and women who have given great thought and attention to these issues; all of them have made extraordinary efforts to join with us here this morning, at some very significant personal sacrifices. And I am enormously indebted, our committee is indebted to them, and I think we will have a more informed and balanced presentation to make to the U.S. Senate as a result of their willingness to share their experience and advice with us.

We will start off with Mr. Coleman. We welcome you. We welcome your testimony.

STATEMENTS OF HON. WILLIAM T. COLEMAN, JR., SENIOR PARTNER, O'MELVENY AND MYERS, WASHINGTON, DC; HON. SHIRLEY HUFSTEDLER, PARTNER, HUFSTEDLER, MILLER, KAUS AND BEARDSLEY, LOS ANGELES, CA; AND HON. F. RAY MARSHALL, PROFESSOR, LBJ SCHOOL OF PUBLIC AFFAIRS, UNIVERSITY OF TEXAS, AUSTIN, TX

Mr. COLEMAN. Good morning, Mr. Chairman, and good morning, Mr. Ranking Member and other members of this committee.

I appear in support of S. 2104. This bill would correct the major problems created by the U.S. Supreme Court's 1989 civil rights employment decisions. It would restore the law to where it was until late spring of 1989. It would also strengthen the enforcement provi-

sions of the existing Federal guarantees of equal employment opportunity.

I have submitted a 37-page statement. I don't intend to read it. I would like to summarize it.

The CHAIRMAN. Let me just say I have had an opportunity to read all the testimonys this morning, and we are grateful that all of our witnesses were good enough to get their testimony in. It makes for a lot, I think, better informed hearing.

What we basically would like to do in terms of the procedures—I am reluctant to put any time limitation on any of these witnesses; but for balance and to ensure that we get the benefits of all of the witnesses' views, if you can summarize your statements in 10 minutes and then we will hear from each of the other panelists and then we will go to 10-minute rounds.

Mr. COLEMAN. Before discussing the provisions in the bill which would overrule *Wards Cove* and part of *Price Waterhouse*, I would like to put the proposed legislation in the context of the welfare and the State of the Union, at least as I see it and, I am confident, as most freedom-loving Americans see it, but especially those who can be shocked by what happened at Tiananmen Square and can rejoice in the freedom which is developing in Eastern Europe.

This year, Mr. Chairman, will be a watershed in the history of civil rights laws. Whether for good or for ill, the Congress and the President will decide its future course.

In February of 1989, no one in this room or indeed in the White House could have imagined that the U.S. Supreme Court could turn so dramatically away from the national consensus in favor of vigorous enforcement of Federal equal opportunity laws.

The Court has forcefully reminded all of us how even the most clearly written of statutes can be drained of practical effectiveness by a crabbed, capricious interpretation.

I do not appear before you out of sympathy or compassion or asking you about past wrongs. I ask that you change the law back to what it was because black Americans, after more than three centuries of contribution to this Nation, are entitled to no less.

Since 1607, black Americans, a majority of whose ancestors came to these beautiful and spacious shores as slaves, and many of whom fought for the United States for freedom and dignity in all this Nation's wars since 1774, have been trying to free themselves from the enduring effects of slavery and from over 347 years of federally and State-imposed and sanctioned racial discrimination and segregation.

The goal has been to achieve for themselves and their children the dream of being fully integrated into the economic, social, political, employment, business, and governmental life of this great Nation.

As stated above, the ancestors of the majority of black Americans came to these shores as slaves under the most inhumane and cruel of conditions. But blacks labored as hard as any men or women to build this great Nation out of the wilderness they found. They cleared the forests, they tended the land, they constructed the houses. The land of opportunity to which millions of whites flocked in the 19th and 20th centuries has, to a very significant degree, been built by blacks who, having been in this country for

generations, still could not benefit from the opportunity it provided the others.

Black Americans today seek in our own country precisely what brings thousands of new immigrants to our shores every year, to achieve the dream of being fully integrated into the society.

From the beginning—and I think this is quite important—even when slaves were forbidden to learn to read or to seek jobs of their own choosing, blacks understood that a good education and a decent job were the keys to full participation in our democratic society. Blacks recognized from the beginning that education and employment remain the essential tools by which black Americans can avoid, for themselves and for this great Nation, crime, inadequate housing, insufficient medical care, poor government in the community, high rates of illegitimacy and illiteracy, and all the other evils which shamefully are still visited upon blacks in our country in greater proportion than upon whites.

And I think that is why it is very appropriate that this legislation is before this committee, because part of this is trying to help blacks achieve those conditions that everybody else in this room thinks is part of the American way.

For generations, 347 years, the task seemed virtually insurmountable for at least three reasons:

First, State and Federal statutes in many instances required, sanctioned, or approved racial discrimination or segregation;

Second, the great steps taken by this Congress after the Civil War were subsequently nullified by the U.S. Supreme Court, which misconstrued the 13th Amendment, the 14th Amendment and the 15th Amendment, and the 19th century civil rights laws; and

Third, the practices of the Federal and State governments created a racial animus and bred among whites, including their children, a widespread feeling of hostility toward blacks. This adversely affected, and still affects, the attitudes of whites that would otherwise have toward blacks, causing them in many instances not to realize that blacks have the same yearnings, feelings, ambitions, and standards of conduct and achievement and yearning therefor as those of their white contemporaries.

And that is the reason why the black community today is particularly shocked the U.S. Supreme Court would overrule—and I repeat the word—overrule previous interpretations of statutes of this country.

Having said that, I would now like to turn to *Wards Cove*. It is clear that that case overrules the *Griggs* case. And I wish you would ask the Justice Department and ask the Attorney General of the United States when he comes up here, whether that is a fact. The fact is that you cannot read *Wards Cove* without saying that it overrules *Griggs*.

Now, I have set forth on pages 13 to 16 in a footnote the statute. That statute, we are not asking any change with respect to what the plaintiff has to prove to get to the jury.

What we are saying is that in a disparate impact case, that once the plaintiff has shown that there is a test of the policy and that test is applied over a period of time with respect to blacks or women that resulted in women and blacks not being a proportionate part of the workforce, to show that there are blacks and women

who have applied for those jobs, to show that any explanation given by the employer, that when you factor it out, there still remains the fact that because of that particular qualification, blacks and women are not represented in the workforce or not provided for in the proportion that there ought to be, based not upon how they live in proportion in the community but based upon the qualifications and the number that appear for the job.

Now, *Griggs* made it clear that once there was that type of showing, that at that point the burden of proof shifted to the defendant, the employer, to demonstrate why this was so and race was not involved.

I want to repeat this, and, Senator Hatch, I would like to come back to you because I know you are one of the people up there that have tried cases in the pit. I mean the first thing you have to realize is that the plaintiff has to put in a case to show the facts as I have outlined. And I will go so far as to describe to you what he has to prove.

He has to prove that a group, a protected person under the statutes, had been disproportionately excluded after applying for the job. He has to show which employment practices resulted in this exclusion. He has to show that if you exclude all the other reasons why people could be excluded, you still haven't answered why, when you look at the workforce, there are very few blacks or very few women. He has to show that there was a significant number of people who have applied for the job.

Based upon that, and as you have tried cases, you have the right to go to the jury.

At that point, the defendant has to put in a defense. Now, he certainly can put in a defense, well, you have used the wrong type of statistics or the wrong type of methods. That all goes to whether the plaintiff has shown his prima facie case.

But once that is done, then the question is: You've got a workforce here which is disproportionate; you've got the fact that blacks and women have applied for the jobs; they have been excluded. What reason does the employer give for that happening?

The U.S. Supreme Court, in *Griggs*, made it crystal-clear that that is a defense that the employer has to give and that he has to demonstrate that the reason he or she used was one that was a business necessity. That is what *Griggs* holds. You can read it. If you have any doubt, I quote it not only from *Griggs* but I quote it from about eight other cases. And they all say that once the plaintiff has done what is said, the defendant can come in and he has the burden.

The U.S. Supreme Court, much to everybody's surprise, even the government's surprise, said, "No, wait a minute, that once they put forth that defense, that shifts the burden back to the plaintiff and it's the plaintiff that has to be able to say that the reason that the employer gives is one which is incorrect and that he can demonstrate that is not valid."

Well, you shift it. And I would just beg you to look at the antitrust laws. Look at the Clayton Act. I mean, what is there once the plaintiff proves his case and he can get to the jury, if I want to defend for one of my wealthy clients whether they violated an anti-

trust law, I have the burden of proof on the defense. That is all we expect to do. That is all section 3 and section 4 does.

So I wish you would take a look at it, and if I am correct, I think you would tend to agree with me.

Now, we have put in, we have had some students at Yale do some work, and I would like to put in two sets of charts. One demonstrates that there are about 200 cases prior to *Wards Cove* that says the law is as we have described it. And I would like to first put those in, and this is what we show. All the Federal judges that you all have been approving and everything. [Laughter.]

Reading the statutes, the good ones and the bad ones have all agreed that that is what the case says. [Laughter.]

Then the second one, and this goes to the second issue, that in *Griggs*, the Court says that once you have this disparate impact, that the only defense the employer has is, "I have a rule which is a necessity for me to be able to get the right type of workforce." That is what *Griggs* says; that is what the other cases say. And you have Judge Posner, who certainly sometimes is not on our side, saying that when they decided *Wards Cove*, they took the word "necessity" out of the statute. And once again, we have done, or some of the Yale law students—I guess it's good; I didn't go to Yale, but I will rely upon it. [Laughter.]

I had two kids who went to Yale, so I assume it's good. [Laughter.]

Senator HATCH. This is very suspicious. [Laughter.]

And we have collected for you a series of cases which once again demonstrate that prior to *Wards Cove* the law was as we say it is.

As a result of *Wards Cove*, since that time, there have been about 305 cases which have been changed. So this has had a great effect. And I repeat this because in the Justice Department—and after all the Attorney General was my governor; I campaigned for him and I think he is a good public servant—but sometimes they are not completely clear. Sometime they say, "Oh, *Wards Cove* didn't change, or *Griggs*." Sometimes they do.

I am making the statement to you and I wish you would ask them, that nobody can read *Wards Cove* without coming to the conclusion that it overruled *Griggs* in the respect that I said, and I cover two others in my written presentation.

Now, I guess my 10 minutes are about up. I would like to spend a moment on the *Price Waterhouse* case. And I realize, as you pointed out, Senator Hatch, that Mr. Justice Brennan wrote the decision. I think this should demonstrate to you that——

Senator HATCH. Even he can be wrong from time to time?

Mr. COLEMAN. No, this should demonstrate to you that he is a very responsible judge.

Senator HATCH. He is.

Mr. COLEMAN. And that, therefore, when he dissents and says those guys in *Wards Cove* and every other case—— [Laughter.]

Mr. COLEMAN [continuing.] I hope you will give him the same attention.

Now, in *Price Waterhouse*, which involves sexual discrimination, it is not a disparate impact case, it is a disparate treatment case; namely, an intentional case.

Senator HATCH. Right.

Mr. COLEMAN. And there, it was clear that when that lady came up for partnership, that some of those partners turned her down because of her sex. They said it. That's on the record. There was a finding to that effect.

It so happened that there weren't enough of them that did it on that ground that the Court could say that's why she didn't become a partner. Other people said she didn't become a partner because she didn't get enough business or she didn't do a lot of other things or sometimes she wasn't that good with clients, although they had to concede there were males that weren't that good with clients and they still became partners.

But leaving that aside, the fact is that they found a nonillegal reason why she wasn't. So, therefore, you have a situation where there is proof of an illegal reason and there is proof of a nonillegal reason.

Now, unfortunately, Justice Brennan, with all due respect, he went to the Harvard Law School and he remembered Torts I, and therefore he says that when you get hit by a legal and an illegal thing at the same time, you can't recover.

But you're not dealing here with trying to recover under a negligence statute, what you are dealing with here is with a Federal statute which says that it is illegal for people to conduct their business based upon discriminating against people based upon sex or race.

Therefore, once there is any evidence that clearly that there was by partners, and partners bind a partnership, that some of them were discriminating against this woman on the basis of sex, that certainly—and all section 5 of the bill says is that when you have a record like that, the Federal judge should be able to enjoin the partnership from saying, "When you deal with these people in the future, don't you take race or religion into consideration and don't you do it on that basis." And therefore, there can be an injunction, and that is what section 5 does. You've got to do it.

You just cannot have cases in this Court where Federal judges hear them, where the record is clear that there was racial or sexual discrimination, and let those major institutions continue to be able to do that without issuing an injunction. That's all the case does.

Having said that, I would now turn it over to my other colleagues, and they will talk about other parts of the statute.

But, Senator Hatch, with all due respect, contrary to what you say, this is a very simple matter that statute is, with all due respect—particularly since you spent the first part of your practice in Pittsburgh, so you were a good Pennsylvania lawyer—that statute is not complicated. [Laughter.]

Senator HATCH. Now, that was a dirty blow, I'll tell you. [Laughter.]

Mr. COLEMAN. That statute is not complicated. Believe me, I read it. I was amazed at the extent to which Senator Kennedy, Senator Metzenbaum, Senator Jeffords, and others could make it so clear, because I struggled with how do you change these cases, because you can't read these cases without realizing that they are wrong. And I am amazed, and I compliment the Senator and, Senator, there are very few concise words that make the change and not do

the thing. There are no quotas here. I mean, the whole contrary idea that just walk into a community and it's 80 percent black and 20 percent white, you therefore think the workforce should be 80-20 percent.

Well, I am telling you, look at Washington, DC, you know very well that's not right. [Laughter.]

And therefore, you have to prove these cases by statistics, and unfortunately the Legal Defense Fund has lost almost as many as they have won, and therefore it is clear that the law ought to be put back to where it was at the time of *Griggs* and you ought not to let *Wards Cove* stand.

Thank you.

[The prepared statement of Mr. Coleman (with responses to questions submitted by Senator Jeffords) follows:]

PREPARED STATEMENT OF WILLIAM T. COLEMAN, JR.

My name is William T. Coleman, Jr.[1] I appear in support of S. 2104, which would correct the major problems created by the U.S. Supreme Court's 1989 civil rights employment decisions. It would restore the law to where it was until late spring of 1989. It would also strengthen the enforcement provisions of the existing federal guarantees of equal employment opportunity.

This legislation raises a variety of technical issues which the Committee will consider over the course of the next two weeks of hearings. I will address some of those questions later in my testimony, and subsequent witnesses, I am sure, will delve even deeper into the relevant details. There will be ample discussion, probably more than you really want at times, regarding the intricacies of the Federal Rules of Civil Procedure, the various subsections of title VII of the 1964 Civil Rights Act, and the somewhat arcane legislative history of the Civil Rights Act of 1866.

But first I would like to put the proposed legislation in context of the welfare and the state of the Union, at least as I see it and, I am confident, as most freedom loving Americans see it who can be shocked at what happened at Tiananmen Square in China and can rejoice in the freedom which is developing in Eastern Europe.

There is something far more fundamental and far reaching that is at stake in these hearings, and at this juncture in the development of the law than mere technicalities and procedural issues. This year, Mr. Chairman, will be a watershed in the history of civil rights laws—whether for good, or for ill, the Congress and the President will decide its future course. In February of 1989 no one in this room, or indeed in the White House, could have imagined that the U.S. Supreme Court could turn so dramatically away from the national consensus in favor of vigorous enforcement of federal equal opportunity laws. The Court has forcefully reminded us all of how even the most clearly written of statutes can be drained of practical effectiveness by a crabbed, capricious interpretation. We need not debate how far the Court has gone down that road to agree that it has chosen that direction for the law.

If the decisions at issue involved the interpretation of the Constitution, both the terms of the Constitution itself, and simple prudence, would suggest deference to the Court's judgment. But the issue today is the interpretation, and resuscitation, of federal statutes, matters well within the powers and responsibilities of the Congress. I urge the Committee to correct the problems created by these decisions, and by so doing to change the ominous direction in which the construction of federal civil rights laws appears now to be headed.

I do not ask that you do so out of sympathy or compassion or guilt over past wrongs. I ask it because black Americans, after more than three centuries of contributions to this nation, are entitled to no less. Since 1607 black Americans, a majority of whose ancestors came to these beautiful and spacious shores as slaves, and many of whom fought for the United States for freedom and dignity in all the nation's wars since 1774,[2] have been trying to free themselves from the enduring ef-

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[1] Senior Partner, O'Melveny & Myers, Chairman of the Board of the NAACP Legal Defense and Educational Fund, Inc., Secretary of Transportation in the Ford Administration.

[2] For example, 5,000 blacks fought for America's independence in the Revolutionary War, nearly a century before blacks themselves were freed from slavery. Over 400,000 blacks served

Continued

fects of slavery and from over 347 years of federally and state imposed and sanctioned racial discrimination and segregation. The goal has been to achieve for themselves and their children the dream of being fully integrated into the economic, social, political, employment, business and governmental life of this great nation. As stated above, the ancestors of the majority of black America came to these shores as slaves, under the most inhumane and cruel of conditions. But blacks labored as hard as any men or women to build this great nation out of the wilderness they found —they cleared the forests, they tended the land, they constructed the houses. The land of opportunity to which millions of whites flocked in the Nineteenth and Twentieth Centuries had to a very significant degree been built by blacks who, despite having been in this country for generations, still could not benefit from the opportunities they had provided to others.

Black Americans today seek in our own country precisely what brings thousands of new immigrants to our shores every year—to achieve the dream of being fully integrated into the economic, social, political, employment, business and governmental life of this great nation. From the beginning, even when slaves were forbidden to learn to read, or to seek jobs of their own choosing, blacks understood that a good education and a decent job were the keys to full participation in our democratic society. Blacks recognized from the beginning and recognize even more today that education and employment remain the essential tools by which black Americans can avoid, for themselves and for the nation, crime, inadequate housing, insufficient medical care, poor government in the community, high rates of illegitimacy and illiteracy and all the other evils still shamefully visited upon blacks in our country in greater proportion than upon whites.

For generations—347 years—the task seemed virtually insurmountable for at least three reasons. First, state and federal statutes in many instances required, sanctioned or approved race discrimination or segregation. [3] Second, the great steps taken by Congress after the Civil War were subsequently nullified by the U.S. Supreme Court, which misconstrued the Thirteenth, Fourteenth and Fifteenth Amendments and the Nineteenth Century civil rights laws. [4] Third, the practices of the federal and state governments created racial animus and bred among whites, including their children, a widespread feeling of hostility towards blacks. This adversely affected the attitudes that whites would otherwise have towards blacks, causing them in many instances not to realize that blacks have the same yearnings, feelings, ambitions and standards of conduct and achievement and yearnings therefor as those of their white contemporaries. [5]

In the middle of this century—less than 36 years ago—*Brown* v. *Board of Education* was the watershed that began a drastic change both in the law and in the attitude of government officials and private citizens alike. Thus for 36 years this nation has been trying to wipe out a sickness and infection in our society which existed for over three centuries years. Since 1954, although slowly and haltingly, the nation has moved ever closer to a society in which blacks are treated as free and equal. Congress contributed greatly to the pace and direction of that change through a series

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in various units during the Civil War and more than 2.3 million blacks have fought for the U.S. in the four major wars of this century. In the Vietnam war blacks were a disproportionate percentage of the soldiers who fought and of those that were killed or wounded. Moreover, this distinguished military service over the past 215 years has been rendered in the face of tremendous hardship, discrimination and segregation *within* the armed services. See *Black Americans In Defense of Our Country*, United States Department of Defense (1985).

[3] Even by the middle of the 20th century many states still had segregation statutes affecting such things as travel, hospitals, recreation facilities, washrooms on the job, public schools, miscegenation, jails and adoptions. Violations of these statutes were in some cases punishable by fines and imprisonment. *See* Greenberg, *Race Relations and American Law*, Columbia University Press 1959 (Appendix A).

[4] *See, e.g., Civil Rights Cases*, 109 U.S. 3 (1883); *United States* v. *Reese*, 92 U.S. 214 (1876); *Plessy* v. *Ferguson*, 163 U.S. 537 (1896).

[5] For another distinctive, discrete minority, Shakespeare's Shylock described the issue as follows: "He hath disgraced me, and hindered me half a million; laughed at my losses, mocked at my gains, scorned my nation, thwarted my bargains, cooled my friends, heated mine enemies, and what's his reason?—I am a Jew. Hath not a Jew eyes? Hath not a Jew hands, organs, dimensions, senses, affections, passions; fed with the same food, hurt with the same weapons, subject to the same diseases, healed by the same means, warmed and cooled by the same winter and summer as a Christian is? If you prick us do we not bleed? If you tickle us do we not laugh? If you poison us do we not die?" Shylock's alternative was "revenge". Shakespeare, *Merchant of Venice*, Act 3, Scene 1, lines 50 to 61. The black American, however, has sought relief through the Congress and the courts confident that since his cause is just, justice and fairness will be done.

of bold legislative initiatives.[6] For years, as the nation worked through the intractable realities of racial discrimination, a synergistic relationship existed between the U.S. Supreme Court and the Congress, each building on the contributions and innovations of the other. By the time of the 1983 decision in *Bob Jones University* v. *United States*,[7] Chief Justice Burger could speak with confidence of the consensus, encompassing all three branches of the federal government, that racial discrimination—public or private—was contrary to fundamental public policy. That consensus was shared by the vast majority of the American people, who took justifiable pride in the progress the nation had made towards racial justice.

And then in the late spring of 1989, suddenly and inexplicably, the U.S. Supreme Court of the United States, which had initiated and contributed so much of this remarkable national consensus, turned in another direction. In a few weeks the U.S. Supreme Court handed down a series of decisions that threatened the vitality and enforceability of federal equal employment laws. No one can seriously contend that the statutes at issue were framed in such a manner as to compel these decisions. On the contrary, in virtually every instance the federal circuit courts, or even the U.S. Supreme Court itself, had construed the laws in the opposite way. The pattern of these decisions, including *Patterson* v. *McLean Credit Union*,[8] suggests that the Court had abandoned the well-established principle that remedial civil rights statutes ought to be broadly construed. It became all too clear how easily the substance of federal civil rights laws could be strangled in technicalities.

The change was so dramatic and palpable that the Court itself found it necessary to insist, somewhat lamely, that "[n]either our words nor our decisions should be interpreted as signalling one inch of retreat from Congress' policy to forbid discrimination in the private, as well as the public, sphere." [9] Justices Marshall, Blackmun, Brennan and Stevens regarded the decisions as not a retreat, but a complete rout. Justice Blackmun commented in his dissent in *Wards Cove Packing Co.* v. *Atonio*,

> One wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was.[10]

As a matter of statutory construction the results in some of these decisions are, to put the matter delicately, far fetched, and in some instances, actually absurd. For example, in *Patterson* can it seriously be imagined that in 1866 Congress intended to forbid a private employer from refusing to hire or promote a black because of race, but felt at the same time there would be nothing wrong if the employer hired a black woman and then visited her with harassment which certainly would make the contract a nullity or at least make her life a living hell? But that is the result of the Court's ruling in *Patterson*. Similarly, are we truly to believe, although the Court in *Lorance* v. *AT&T Technologies* [11] so held, that when Congress enacted title VII, it intended to require an employee to challenge invidiously motivated rules years before the rules were ever applied, and years before the employee even worked in the department covered by the rules. I cannot conceive of how Congress, except as some sort of cruel joke, would have chosen to enact such self-nullifying measures.

The Justice Department has endorsed overruling *Patterson* and *Lorance*, and I welcome that decision; but I would urge the Committee still to keep these two decisions in mind in attempting to assess the general Court attitude which gave rise to the other, still controverted decisions.

Justice Stevens, in his *Wards Cove* dissent, expressed bafflement as to the reason for that decision. "Why the Court undertakes these unwise changes in elementary and eminently fair rules is a mystery to me." [12] This bundle of retrogressive decisions is no favor to employers. In the case, for example, of disparate impact litigation under title VII, 18 years of decisions after *Griggs* had refined, fleshed out and clarified the law. Employers had a reasonably clear idea of what the law required and could with some degree of confidence bring their practices into conformity with it. After *Wards Cove*, however, the law seems in a state of complete turmoil. A decade of additional litigation may clear all this up, but for now employers, who must balance their assessment of legal requirements against any number of compet-

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[6] *See, e.g.*, the Civil Rights Act of 1964, the Voting Rignts Act of 1965, the Civil Rights Act of 1968, the Civil Rights Attorney's Fee Awards Act of 1976, the Voting Rights Act Amendments of 1982 and the Fair Housing Amendments Act of 1988.

[7] 461 U.S. 574, 598 (1983).

[8] 109 S.Ct. 2363 (June 5, 1989).

[9] *Patterson*, 109 S.Ct. at 2379.

[10] 109 S.Ct. 2115, 2136 (June 5, 1989).

[11] 109 S.Ct. 2261 (June 5, 1989).

[12] 109 S.Ct. at 2136.

ing considerations, can only have the vaguest idea of what the law requires. Change, uncertainty, and instability in the law may be intriguing, and financially rewarding, for lawyers, but it is often quite bad for our clients. To judges the arguments in 5–4 decisions like *Wards Cove* may be fascinating ideological struggles; a new appointment, or a few second thoughts by a swing justice, may yield get another chapter. But for individuals and firms which must conform their conduct to these decisions, such uncertainty can be quite unwelcome.

From the point of view of civil rights, of course, these retrogressive decisions are unwelcome indeed. But more is wrong here than the technical merits of these decisions. It is wrong that 120 years after the adoption of the Fourteenth Amendment, and 25 years after the enactment of the 1964 Civil Rights Act, black Americans are being forced to fight all over again battles that were fought and won by past generations. *Patterson* has virtually eviscerated the 1866 Civil Rights Act. *Wards Cove* has so damaged *Griggs* that civil rights lawyers are reluctant to bring any more disparate impact cases. *Lorance* has been construed by one lower court judge as virtually legalizing systematic intentional discrimination.[13] The whole corpus of federal equal employment law is in critical condition.

Civil rights laws, of course, are not the only important social legislation in the country. But for some inexplicable reason, they are the only laws facing wholesale judicial evisceration. Other social problems, once addressed by legislation, stay solved. The U.S. Supreme Court has not indicated any inclination, for example, radically to shrink through reinterpretation the nation's laws forbidding child labor. The still intractable racial problems that the nation will face in the years ahead can never be solved if we have to devote our time and energies just to preserving the progress already made and the legislation already on the books. The national consensus regarding racial discrimination was won only after decades of suffering and at enormous cost. The nation has made a fundamental, if long overdue, decision to condemn racial discrimination, in all its forms and manifestations, and to insist that it be eradicated through all the means known to the law. That decision should not be subject to reconsideration, even in the highest court in the land.

As we discuss each case and the statutory language we seek to have adopted to change the result of the decision, one should note the following with respect to these decisions:

(1) Each deals with the interpretation of a federal statute or the Federal Rules of Civil Procedure, not the Constitution;
(2) Each was decided by a closely divided Court;
(3) In each case, as members of the Court and commentators agree, the Court cut back on principles long established by its own prior decisions, or the Court rejected the law as developed by all of the circuit courts; [14]
(4) In each case there was no change in the language of the statute between the original decision and the 1989 Court decisions that wrought the drastic changes; and
(5) In each case the decision made it much harder, and in some cases impossible, for minorities or women to obtain the statutory rights that they would otherwise have been entitled to under the statute.

I will now discuss the statutory language suggested to overturn the results in the *Wards Cove* and *Price Waterhouse* v. *Hopkins*.[15]

WARDS COVE

I would like to focus my remarks in particular on the provisions of the proposed legislation that would overrule certain aspects of the June 1989 decision in *Wards Cove Packing Co.* v. *Atonio*. *Wards Cove* is concerned with the application of, and threatens the vitality of, one of the most important title VII cases, *Griggs* v. *Duke Power Co.*[16] Indeed, *Griggs* in the field of employment is comparable to *Brown* in

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[13] *Davis* v. *Boeing*, 1989 West Law 127509 (E.D. Pa. 1989).

[14] *See, e.g., Wards Cove*, 109 S.Ct. at 2130, n. 14 (Stevens, J., dissenting); *Martin* v. *Wilks*, 109 S.Ct. at 2374 and n. 3.

[15] S.Ct. 1775 (May 1, 1989).

[16] 401 U.S. 424 (1971). Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(a), provides:

(a) It shall be unlawful employment practice for an employer——

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

Continued

the field of education. That unanimous 1971 decision, written by then Chief Justice Warren Burger, contained two distinct and interrelated holdings. *Griggs* concluded, first, that title VII forbids the use of non job-related tests, job requirements, and other selection criteria, if they have a significant adverse impact on minorities or women. Where such disparate impact exists, it is irrelevant whether or not an employer acted with a discriminatory motive. "Good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability.[17] The only defense would be that the practice was required by business necessity.

In addition *Griggs* and its progeny established a specific order and method of proof in a disparate impact case, specifically assigning the burden of proof on specific issues among the two adversary parties to the litigation.

First, the plaintiff must establish a *prima facie* case by demonstrating that the disputed requirement or requirements had a significant adverse impact on minorities or women. *Albemarle Paper Co.* v. *Moody*.[18] Second, where a *prima facie* case has been so established, the burden of proof shifts to the employer to prove that the requirement is job related.[19] Third, if the employer succeeds in doing so, the plaintiff can still prevail if he or she can show that some alternative requirement would be equally efficacious from the employer's perspective without entailing the objectionable adverse impact.[20] This order and allocation of proof was, and is, essential to the holding of *Griggs*, and to its implementation in the years that followed.

Griggs and its progeny have been of enormous importance in removing, as Congress intended, "artificial, arbitrary and unnecessary barriers"[21] that had previously prevented minorities and women from entering many jobs. The tests at issue in *Griggs*, for example, excluded 94 percent of all blacks.[22] In *Albemarle* over half of all blacks were denied promotions due to the disputed tests, compared to only 10 percent of white employees.[23] In *Dothard* v. *Rawlinson*[24] the combined height and weight requirements excluded approximately 41 percent of all women, but only 0.24 percent of all men.[25] Given the potent capacity of such tests and requirements to exclude minorities and women from jobs and promotions, the continued vitality of *Griggs* is of enormous practical importance.

Prima Facie Case: I would like to begin with an aspect of *Griggs*, and of the holding in *Wards Cove*, which the proposed legislation does not affect in any manner—the quantum of proof necessary to establish adverse impact. I touch on this because I understand that considerable concern was expressed about this question at another hearing earlier this week.

The specific concern, or more accurately the specific misunderstanding, that was expressed, was that a plaintiff could ordinarily establish a *prima facie* case of disparate impact merely by showing that an employer had a smaller proportion of minority employees than existed in the population as a whole. That was not the law as set forth in title VII of the 1964 Act, it is not the law established by the *Griggs* decision, it was not the law before *Wards Cove*,[26] it is not the law after *Wards Cove*, and it would not be the law if this legislation is adopted.

Wards Cove makes clear, as have the lower courts for many years, that proof of a *prima facie* case requires two additional types of evidence. First, the plaintiff must ordinarily show what impact the requirement actually had on individuals who applied for the position at issue or took the disputed test.[27] Plaintiffs may look to

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(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

[17] 401 U.S. at 432.

[18] 422 U.S. 405, 425 (1975).

[19] *Griggs*, 401 U.S. at 437.

[20] *Albemarle*, 422 U.S. at 426.

[21] *Griggs* 401 U.S. at 431.

[22] *Id.* 430 n. 6.

[23] Brief for Respondents, No. 74-389, p. 20 and n. 25a.

[24] 433 U.S. 321 (1977)

[25] *Id.* at 329–30 and n. 12.

[26] There is one very narrow exception to this rule: If the job in question is one which virtually everyone in the general population is qualified to perform, and there is no application process, then a significant disparity between the minority representation in the workplace as compared to the general population could in certain cases be the basis of a *prima facie* case. *See Wards Cove*, 109 S.Ct. at 2121 n. 6; *Teamsters* v. *United States*, 431 U.S. 324, 340 n. 20 (1977); *Dothard* v. *Rawlinson*, 433 U.S. 321, 329–330 (1977).

[27] *Wards Cove*, 109 S.Ct. at 2123.

some other broader pool only if the application process itself is tainted by discrimination, or if there is no application process at all. Second, the plaintiff must show what impact the disputed requirement had on *qualified* actual or potential applicants.[28] Of course in any disparate impact case the plaintiff, by definition, is challenging the legitimacy of one or more qualifications insisted upon by an employer, but where there are qualification requirements of undisputed legitimacy, a plaintiff must ordinarily take them into account in establishing a *prima facie* case.

Wards Cove clearly indicates that satisfying these requirements will often be difficult. Practical experience demonstrates that plaintiffs frequently have considerable difficulty establishing a *prima facie* case. There are in fact several hundred disparate impact cases which civil rights plaintiffs lost because they were unable to meet the stringent requirements needed to establish a *prima facie* case.

The Burden of Proof: Sections 3 and 4 of the bill seek to restore the rule that the burden of proof on the issue of justification in disparate impact cases is on the defendant employer. For 18 years prior to *Wards Cove* the burden of proof regarding job-relatedness clearly rested on the defendant employer. In *Griggs* in 1971 the U.S. Supreme Court held unanimously that

> Congress has placed on the employer the *burden of showing* that any given requirement must have a manifest relationship to the employment in question.[29]

In *Albemarle*, decided in 1975, the Court emphasized that an employer must "meet the *burden of proving* that its tests are 'job related.' "[30] In *Dothard* v. *Rawlinson*, decided in 1977, the Court insisted that an "employer *prov[e]* that the challenged requirements are job related."[31] In 1982, the Court in *Connecticut* v. *Teal* held that an "employer must . . . *demonstrate* that any 'given requirement [has] a manifest relationship to the employment in question.' "[32]

The lower court decisions applying *Griggs* emphasized again and again that this burden was on the employer, not the plaintiff. That point was made in virtually every way it could be stated in the English language. These decisions insisted that the employer bore the "burden of proof," that the employer bore the "burden of persuasion," or that the employer was obligated to "prove," "demonstrate," "establish" or "show" that a disputed requirement was job related. There are a large number of lower court decisions reiterating these well established requirements and finding that a plaintiff failed to establish a *prima facie* because of these requirements.

As recently as November 1987 the Department of Justice openly agreed that the employer bore the burden of proof. In its amicus brief in *Watson* v. *Fort Worth Bank*,[33] the Department insisted:

> [I]n *Griggs* . . . the Court said "Congress has placed on the employer the *burden of showing* that any given requirement . . . ha[s] a manifest relationship to the employment in question."[34]
>
> [A]n employer must *show* that the device challenged is "demonstrably a reasonable measure of job performance."[35]
>
> [A]n employer ordinarily must . . . *demonstrate* . . . that the selection process has a sufficient connection with effective job performance or efficient business operation.[36]

The Department also argued that an employer's burden *ought* to be greater in a disparate impact case than in a disparate treatment case:

> [T]he principle *difference* between disparate treatment and disparate impact analysis is the showing that a defendant must make in order to rebut a *prima facie* case of discrimination. In a disparate treatment case based on statistical evidence, the defendant must *produce evidence* of the "legitimate", non discriminatory reasons it had for the actions it took and in that way refute the inference than an improper discriminatory motive was at work. . . . *By contrast*, in a disparate impact case, the defendant must make *the more rigorous initial showing* that the selection device producing the statistical disparity has a "manifest relationship" to successful job performance or to the safe and efficient operation of its business.[37]

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[28] *Id.*, at 2122 and n. 7.
[29] 401 U.S. at 432 (emphasis added); *see also id.* at 431.
[30] 422 U.S. at 425 (emphasis added).
[31] 433 U.S. at 329 (emphasis added).
[32] 457 U.S. 440, 446 (1982) (citing *Griggs*, 401 U.S. at 432) (emphasis added).
[33] 108 S.Ct. 2777 (1988). This brief was signed, *inter alia*, by the Honorable Charles Fried, Donald Ayer, and the Honorable William Bradford Reynolds (hereinafter, "Brief").
[34] *Brief*, at 8.
[35] *Id.* at 18 (emphasis added).
[36] *Id.* (emphasis added).
[37] *Id.* at 17 (emphasis added).

The lower courts and commentators [38] have recognized that *Wards Cove* overturned 18 years of precedent when it placed on the plaintiff the burden of proof regarding job relatedness. In *Hill* v. *Seaboard Coast Line Railroad Co.*,[39] *the Eleventh Circuit commented that "[t]he Supreme Court's decision in Wards Cove* made clear that the employer merely has the burden of production . . . and overruled the existing law in this circuit on this issue." In *Allen* v. *Seidman* [40] Judge Posner observed *Wards Cove* . . . modified the ground rules that most lower courts had followed in disparate-impact cases. Before *Wards Cove* it was generally believed that if the plaintiff in a Title VII case showed . . . that a criterion . . . was disproportionately excluding members of a group protected by the statute, . . . the burden shifted to the employer to persuade the judge . . . that the criterion . . . was necessary to the effective operation of the employer's business . . . . *Wards Cove* returns the burden of persuasion to the employee, while leaving the burden of production on the employer.

The legislation now before this Committee—Sections 3 and 4—would merely restore the law to where it stood prior to the 1989 decision in *Wards Cove*, placing on the employer, as did *Griggs, Albemarle, Dothard* and *Teal*, the burden of proof regarding job relatedness. That allocation of the burden of proof was entirely workable over the last 18 years, and it is eminently fair. When job relatedness is at issue, the employer is in possession of all the relevant evidence, and because all the key workers and supervisors are in its employ, a defendant company is in a position to conduct a validity study; it would be virtually impossible for a plaintiff to obtain the degree of cooperation from defendants knowledgeable employees necessary to conduct an "invalidity study". *Wards Cove*, as a practical matter, requires civil rights plaintiffs to "prove a negative"—to demonstrate that among the enormous number of conceivable business interests, not one is connected in the requisite manner to the disputed job requirement. That is a burden that few plaintiffs could ever meet.

The majority opinion in *Wards Cove* misuses the precedent in cases like *McDonnell Douglas Corp.* v. *Green*,[41] and *Texas Dept. of Community Affairs* v. *Burdine* [42]—the disparate treatment cases—to justify shifting the burden of proof on the justification issue to the plaintiff. In the disparate treatment cases plaintiff alleges that the discrimination is intentional. Once he puts in evidence sufficient to establish a *prima facie* case—sufficient to overcome a motion to dismiss at the end of the plaintiff's case—the defendant then offers reasons why what looks like intentional discrimination is not. Because this proof goes to the same factual issue raised by plaintiff's initial *prima facie* case—the motive of the employer in taking the disputed action—the plaintiff continues to bear the burden of proof. In the disparate impact cases, however, there is no issue of intent, and the issue of business necessity arises only if the plaintiff has carried its burden of proof and persuasion as to disparate impact, which as was demonstrated above represents a vigorous standard of proof. In this situation, therefore, the defense is in the posture of trying to show the court that, even though disparate impact has been proven, there is nonetheless a business necessity that justifies such business practices.[43]

Accordingly, allocating the burden of proof with respect to business necessity in the disparate impact cases to defendant employers, as Justice Stevens observed in his dissenting opinion in *Wards Cove*,[44] is consistent with the normal rule placing that burden on the party asserting a justification defense. Congress has on occasion expressly provided by statute that the burden of establishing such a justification must be borne by the defendant. The Robinson Patman Act, for example, provides . . .

> Upon proof being made . . . that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the [Feder-

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[38] *See*, note, the U.S. Supreme Court 1988 Term, 103 Harv. L.Rev., 40, 350–361 (1989).
[39] 1989 U.S. App. LEXIS (5335, p. 23 n. 12, 11th Cir., Oct. 10, 1989)
[40] Slip opinion, pp. 1–2 (No. 88–1811, 7th Cir., July 27, 1989)
[41] 411 U.S. 792 (1973).
[42] 450 U.S. 248 (1981).
[43] The majority in *Wards Cove* got misled by Justice O'Connor's opinion in *Watson* v. *Fort Worth Bank*, 108 S.Ct. 2777 (1988). In that case it was held that subjective or discretionary employment practices challenged as violating title VII could be attacked under the disparate impact approach. But because she was dealing with a subjective practice she thought that that was the same as intentional discrimination and therefore she wrongly applied the rules developed in McDonald Douglas Corp. v. *Green rather than the rules developed in Griggs.*
[44] 109 S.Ct. at 2131 and n. 17.

> al Trade] Commission is authorized to issue an order terminating the discrimination.[45]

the U.S. Supreme Court has adopted a similar burden-shifting rule under the Clayton Act.[46] The Equal Pay Act permits an employer, under certain specified circumstances, to utilize salary scales that discriminate, but once there is a showing that the employer pays workers of one sex more than workers of the opposite sex for equal work, the burden shifts to the employer to show that the differential is justified under one of the Act's four exceptions.[47]

When a state or locality subject to section 5 of the Voting Rights Act seeks approval of a change in its election laws, whether from the Attorney General or from the federal courts, that state or locality bears the burden of proving that the change has neither a discriminatory purpose nor a discriminatory effect.[48] State statutes in a wide variety of circumstances shift the burden of proof to defendants concerning particular issues.[49]

Standard of Job Relatedness: The bill in Section 3 seeks to restore the requirement that the defendant shows business necessity for a rule which has a disparate impact on minorities or women. Judge Posner observed in *Allen* v. *Seidman that Wards Cove* "dilutes the 'necessity' in the 'business necessity' defense." [50] Indeed "necessity," once central to the concept of job-relatedness, seems unfortunately to have disappeared completely from the minds of those who joined the majority opinion in *Wards Cove*. In *Griggs* the Court held that title VII requires "the removal of . . . unnecessary barriers to employment when the barriers operate invidiously to discriminate." [51] "The touchstone is business necessity." [52] In *Dothard* v. *Rawlinson the Court reiterated that title VII mandated removal of such "unnecessary barriers,"* [53] *and held unlawful the requirements there at issue because they were not "essential to effective job performance."* [54] *Connecticut* v. *Teal again emphasized the statutory directive for the elimination of "unnecessary barriers" to the employment of minorities or women.* [55] *As recently as Watson* v. *Ft. Worth Bank the Court treated as synonymous "the 'business necessity' or 'job relatedness' defense."* [56]

But with the advent of *Wards Cove* the requirement of such necessity was abruptly and categorically rejected:

> [T]here is no requirement that the challenged practice be "essential" or "indispensable" to the employer's business for it to pass muster.[57]

The proposed statutory standard—"essential to effective job performance"—is deliberately, and undeniably more stringent than the new standard announced in *Wards Cove*: "whether a challenged practice serves, in a significant way, the legitimate employment goals of the employers." [58] In its brief in *Wards Cove* the Justice

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[45] 15 U.S.C. § 13(b).

[46] United States v. *Philadelphia National Bank, 374 U.S. 321, 363 (1963):"[A] merger which produces a firm controlling on undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive affects."*

[47] Cornina Glass Works v. *Brennan, 427 U.S. 188, 196 (1974)*

[48] Georgia v. *United States, 411 U.S. 526, 538 n. 9 (1973); Pleasant Grove* v. *United States, 479 U.S. 462, 479 (1987).*

[49] See, e.g., Shifting the Burden of Proof in State Environmental Protection Acts: A Blessing to Environmental Plaintiffs, 8 Envtl. L. 851 (1978); Lungren, Deep Horizons—Legislative Shifting of the Burden of Proof in Implied Covenant Cases, 24 Washburn L. J. 30 (1984)

[50] Slip opinion, p. 2

[51] 401 U.S. at 431

[52] *Id.*

[53] 433 U.S. at 328

[54] 433 U.S. at 331

[55] 457 U.S. at 447

[56] 108 S.Ct. at 2789.

[57] 109 S.Ct. at 2125.THE LEGISLATION BEFORE THE COMMITTEE WOULD OVERTURN *Wards Cove* also in this regard, restoring "business necessity" as the affirmative defense to proof of disparate impact, and defining that phrase to mean "essential to effective job performance." "Necessity" was the touchstone of this defense in *Griggs, Dothard, Teal and Watson; the phrase "essential to effective job performance" is taken verbatim from the decision in Dothard. Both that phrase, and the requirement of business necessity, have been widely used by the lower courts to articulate the standard of job relatedness in a disparate impact case. Despite the wide currency of these standards, employers succeeded in large numbers of cases in meeting that requirement and sustaining the legality of tests and job requirements with a proven adverse impact.*

[58] 109 S.Ct. at 2125.

Department noted that "essential to good job performance", an alternative formulation in Dothard, was one among several varying phrases used by the U.S. Supreme Court, and correctly observed that "those varying formulations suggest either higher or lower thresholds of justification." [59] But in that brief, at least, the Department did not assert that the Dothard standard was unmeetable or unworkable. All of these formulations, I would suggest, are more evocative than specific; none could be mechanically applied to yield an absolutely predictable result. It is fair to assert that the Dothard standard sets a higher threshold of justification and that the *Wards Cove* language establishes a significantly less demanding requirement. But it would be a considerable exaggeration to assert that the Dothard standard. which for years had substantial currency in the lower courts, could never be met, just as it might be an overstatement, or at least premature, to claim that under the *Wards Cove* standard every disputed job requirement is certain to be upheld.

The question raised by *Wards Cove* and this legislation is not a choice between always, or never, upholding a contested selection criterion as job related. The issue, rather, is whether, in Judge Posner's apt phrase, there is reason to "dilute" the standard of job relatedness that has prevailed for half a generation. I submit that the change in the law worked by *Wards Cove*, an alteration that to an unquantifiable but palpable degree will facilitate the use of job requirements that close the doors of opportunity to minorities and women, is a change that takes the law in the absolutely wrong direction, and a change which Congress should undo.

Multi-Factor Selection Practices: Section 4 of the proposed legislation permits a plaintiff to challenge not only a specific employment practice but "a group of employment practices". This provision has provoked undue concern and misapprehension and needs not so much a spirited defense as a more detailed exploration of the types of actual cases to which the proposal is relevant.

It is not uncommon for employers to use several different criteria in making a selection decision—a combination of tests, for example, or separate height and weight requirements. In the majority of litigated cases, however, the employer has records from which all parties can determine how much of an adverse impact, if any, each job requirement may have had. In these cases it is of little if any importance which party has the burden of adducing evidence regarding the distinct impact of each requirement. Both parties will have access to the information, and either or both will put it in evidence. In reported cases of this variety it is often unclear, because in part it is unimportant, just which party introduced what evidence.

Where an employer utilizes a number of different job requirements, there may at the very outset of the litigation be some uncertainty regarding which of them is seriously being challenged. A prudent plaintiff's counsel framing a complaint prior to any discovery will ordinarily err on the side of challenging any requirement that might possibly have injured his or her clients. But once counsel for the parties obtain the relevant data and other evidence, it will soon become clear to all just which requirements are and are not being challenged. Simple prudence and a desire to avoid wasting resources, not to mention Rule 11 of the Federal Rules of Civil Procedure,[60] quickly lead plaintiff's counsel to disavow any challenge to a job requirement that clearly has no adverse impact, or which obviously is job related. From a purely academic perspective one could imagine a lawsuit which challenged everything an employer had ever done, but in the real world the practical dynamics of the litigation process prevent cases from being pursued or tried in this manner. In the rare case where this might be a problem, pretrial conferences can quickly clear the air and clarify the issues.[61]

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[59] Brief for the United States, No. 87-1387, p. 23

[60] Rule 11 requires that pleadings, motions and other court papers be signed by a party's attorney or by the party itself if unrepresented, and provides that such signature "constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion or other paper is filed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee."

[61] *See* Rule 16(c)(1), F.R.C.P.

The real problem to which this aspect of the legislation is addressed arises when three circumstances are all present: (1) the employer uses a combination of requirements to make a hiring or promotion decision; (2) that combination, taken together, has a net adverse impact on minorities or women; and (3) the employer does not have records from which it is possible to ascertain which requirement or requirements are responsible for that adverse impact. *Wards Cove*, and the proposed legislation, offer drastically different rules for resolving a case of this sort, and it is with regard to this problem that the legislation is important.

Under *Wards Cove*, where these three factors are present, the disparate impact claim must be dismissed. It is not sufficient that a plaintiff can show that the employer is making employment decisions in a manner which causes a substantial adverse impact; the plaintiff under *Wards Cove* is required, on pain of dismissal, to demonstrate which of the various specific job requirements caused that adverse impact, and to what degree. The plaintiff must "sho[w] that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites." [62] If what *Wards Cove* requires of a plaintiff is literally impossible, that is simply too bad.

In this regard, too, *Wards Cove* should be overturned. Where an employer's practices have a proven adverse impact, the employer under *Griggs* faces a duty to justify that impact. *Wards Cove* permits an employer to evade that duty simply by failing to keep records revealing which of several combined practices did and did not have an adverse impact. Such a rule creates a perverse incentive for employers to avoid keeping such records, and encourages them to use multiple requirements whose individual impact cannot readily be distinguished. The proposed legislation encourages employers to maintain just such records.

The rule of law contained in the bill was expressly endorsed by the Department of Justice in its brief in *Wards Cove*:

> Of course, a decision rule for selection may be complex: it may, for example, involve consideration of multiple factors. And certainly if the factors combine to produce a single ultimate selection decision and it is not possible to challenge each one, the decision may be challenged (and defended) as a whole.[63]

This aspect of the government's brief is consistent with the relevant EEOC guidelines, which expressly permit challenges to a "combination of measures." [64]

Permitting a plaintiff under such circumstances to challenge a combination of job requirements will not lead inexorably to quotas, or entail any other dire consequences. Prior to *Wards Cove* five circuits adhered to the rule of law that would be enacted by the proposed legislation.[65] There is no indication that that rule caused any unfairness to litigants or social ills in the states within those circuits.

Price Waterhouse

The decision in *Price Waterhouse* contains two distinct holdings, only one of which would be affected by this legislation. The Court decided, first, that proof of the existence of a discriminatory motive will not always entitle a plaintiff to backpay or a court-ordered job or promotion. An employer can avoid liability for those forms of relief if it can prove that it also had a separate, independent legitimate motive for taking the disputed action. Thus where a plaintiff proves that he was fired because of his race, but the employer demonstrates that the employee would also have been fired for incompetence, even if he had been white, the dismissed employee is not entitled to get back his or her job, or to an award of backpay. In the Court's view, the invidious motive, although demonstrably present, is not the "cause" of the dismissal in such a case. The proposed legislation will not affect this aspect of *Price Waterhouse*.

In addition, *Price Waterhouse* held that where an employer's actions are prompted by an invidious discriminatory motive, as well as by another legitimate purpose, the employer does not violate the title VII prohibition against intentional discrimina-

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[62] 109 S.Ct. at 2125.

[63] Brief for the United States, No. 87-1387, p. 22, quoted in *Wards Cove*, 109 S.Ct. at 2132 n. 19 (Stevens, J., dissenting).

[64] 29 C.F.R. § 1607.16 (Q).

[65] See Green v. *USX Corp., 848 F.2d 1511, 1520–25 (3d Cir. 1988); Griffin* v. *Carlin, 755 F.2d 1516, 1523 (11th Cir. 1985); Segar* v. *Smith, 738 F.2d 1249, 1270–71, 1288 n. 34 (D.C. Cir. 1984); Atonio* v. *Wards Cove*, 810 F.2d 1477, 1482 (9th Cir. 1987), rev'd 104 L.Ed. 2d 733 (1989); Coe v. *Yellow Freight System, 646 F.2d 444, 451 (10th Cir. 1981); see also Greenspan* v. *Automobile Club of MiCh., 495 F.Supp. 1021, 1037 (E.D. Mich. 1981).*

tion.[66] This second holding, although seemingly quite similar to the first, has separate practical consequences. The legislation before the Committee—Section 5 of the bill—by clarifying the definition of what violates title VII, would overturn this aspect of *Price Waterhouse*.

This second aspect of *Price Waterhouse* means that if a court in an individual title VII case finds that the defendant has clearly engaged in intentional discrimination, the Court is powerless to end that abuse if the particular plaintiff who brought the case would have suffered the disputed employment action for some legitimate, alternative reason. And this aspect of the *Price Waterhouse* ruling represents a substantial departure from prior case law, which clearly recognized that proven discrimination in direct violation of the statute would result, at a minimum, in liability finding and entitlement to injunctive and declaratory relief and attorneys' fees.[67] Section 5 of the bill, by defining discrimination as unlawful E se, empowers a federal court in such a situation to enjoin the proven discrimination without waiting for another plaintiff to bring an entirely new lawsuit. In many injunction suits the plaintiff is entitled to an injunction against a certain course of conduct even if it is not entitled to damages. In certified class actions, moreover, the class representative can obtain such injunctive relief even if it becomes clear, after trial, that that particular plaintiff was not the victim of discrimination. Cf. Franks v. *Bowman Transportation Co. 424 U.S. 747 (1976). Conferring this remedial power on the federal courts is more consistent with the basic purpose of title VII, as described in Price Waterhouse*, to render race and sex "irrelevant to employment decisions", and "to condemn even those decisions based on a mixture of legitimate and illegitimate considerations." [68]

This aspect of the bill will also allow the court, or a jury, to award monetary relief other than backpay, where that would otherwise be appropriate. Even where the existence of a dual motive means that an employer's discriminatory action did not cause a loss of wages, making backpay inappropriate, that action may cause other harms which would be redressable under the new language of the bill authorizing compensatory damages. The dismissal of a black employee, for example, might be accompanied by offensive racial slurs; even where the dismissal would have occurred anyway for some other reason, the racial slurs, and the humiliation which they cause, are solely the result of the discriminatory motive, and should thus be redressable. Similarly, punitive damages may in some instances be warranted by egregious misconduct even where an award of backpay would be inappropriate.

The rule of law which the proposed legislation would write into title VII is the very interpretation of the statute advocated by the Department of Justice in its brief in *Price Waterhouse*:

> [I]t is proper to place the burden on the defendant to prove that a given employment decision would have been the same in a discrimination-free environment . . . . If the defendant makes such a showing, the plaintiff is made whole by an award of attorney's fees and an injunction against future discrimination. In effect, the defendant is ordered to cease discriminatory activity, which enhances the plaintiff's employment opportunities in the future. But the defendant need not hire, reinstate, promote or provide backpay to the plaintiff. . . .[69]

Under Section 5 the existence of a legitimate alternative purpose in a mixed motive case remains relevant, but it results, not in a finding that the employee never violated the law, but only in a limitation on the available remedy. In no event will an employer be subject to a monetary award merely because it entertained evil, discriminatory thoughts, without ever having acted on those motives.

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[66] The plurality opinion observes that the existence of that second motive precludes a finding that there was any "violation of the statute." 109 S.Ct. at 1787 n. 10. Justice White, in a concurring opinion, remarked "I agree with the plurality that if the employer carries this burden [of proving the existence of a second motive], there has been no violation of title VII." 109 S.Ct. at 1796 n. 1.

[67] See, e.g., Bibbs v. *Block, 728 F.2d 1318 (8th Cir. 1985); King* v. *Trans World Airlines. Inc., 738 F.2d 255 (8th Cir. 1984); Ostroff* v. *Employment Exchange. Inc., 683 F.2d 302 (9th Cir. 1982); Nanty* v. *Barrows Co., 660 F.2d 327 (9th Cir. 1981); Roberts* v. *Fry, 29 FEP cases 1445, 1451-52 (D.D.C. 1980).*

[68] 109 S.Ct. at 1785.

[69] Brief of the United States, No. 87-1167, p. 23; see also *Id.* at 7 ("Title VII . . . allows a defendant to limit the plaintiff's remedy by showing . . . that it would have reached the same employment decision even in the absence of the illegal discrimination").

Conclusion

No doubt others will comment on the provisions in the bill which seek to overrule or modify the decisions in *Patterson, Lorance, Wilks, Zipes, and Jeff D.* In my view the legislation proposed by S. 2104 is eminently fair, consistent with the public interest and is required to keep the Nation on the journey started in 1954, and in 1964, to wit, the eradication of racial and sexual segregation and of discrimination against minorities and women and all effects thereof in this Country as soon as possible.

Letter from Mr. Coleman to Senator Kennedy

O'Melvey & Myers, 555 13th Street, NW,
Washington, DC, March 27, 1990

Honorable Edward M. Kennedy
Chairman, Senate Committee
on Labor and Human Resources
U.S. Senate
Washington, DC 20510

Dear Mr. Chairman: I am writing in response to your letter of March 15, 1990, in which you enclosed two questions by Senator Jeffords resulting from my written testimony given on S. 2104, the Civil Rights Act of 1990. The first question asked by Senator Jeffords was:

What was the state of the law prior to *Wards Cove* on disparate impact claims based on a group of employer practices (as opposed to a single identified practice) in terms of the plaintiff's obligation to isolate the impact of each practice?

Prior to the U.S. Supreme Court's *Wards Cove* decision in 1989, the prevailing law was the in cases challenging the disparate impact of a multicomponent selection process or system, the plaintiffs were not required to isolate or "pinpoint" the distinct impact of each component of the process or system. The plaintiffs' obligation was to make a *prima facie* showing that a disparate impact had resulted from an identified combination of selection factors or practices, which in some case meant a formal selection process made up of different parts. In other cases the combination was different employment practice which, while not part of a single and formalized selection process, were used in such a way as to produce an aggregate disparate impact in the employer's hiring or promotion.

One of the reasons courts found it imperative to apply the disparate impact analysis to the end result of a multicomponent selection system, rather than limiting it to cases where the plaintiffs could isolate the precise impact of each component, was that substantial disparate impact against minorities and women is often caused by the interaction of two or more subjective components. Often the precise dimensions of this interaction are not or cannot be documented. In this context a "pinpointing" requirement would be extremely difficult if not impossible for the plaintiff to meet, and courts therefore have allowed plaintiffs to meet their obligation by showing that the end result had a discriminatory impact.

Courts have also pointed out that the effect of such a "pinpointing" requirement would be that victims of discrimination could only challenge readily perceptible barriers under the disparate impact model., allowing more subtle barriers—which are particularly present in selection practices for mid and upper level jobs—to work their discriminatory effects and thereby thwart the purposes of title VII. This is another reason why the courts have rejected the "pinpointing" requirement.

The cases on point include: Green v. *USX Corp., 843 F.2d 1511, 1520–25 (3d Cir. 1988); Griffin* v. *Carlin, 755 F.2d 1516, 1523 (llth Cir. 1985); Segar* v. *Smith, 738 F.2d 1249, 1270–71, 1288 n. 34 (D.C. Cir. 1984); Atonio* v. *Wards Cove*, 810 F.2d 1477, 1482 (9th Cir. 1987); rev'd 104 L.Ed 733 (1989); Coe v. *Yellow Freight System, 646 F.2d 444 451 (lOth Cir. 1981).*

The prevailing case law on this issue set forth in the cases cited above, prior to *Wards Cove.* was consistent with the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 16–7, which were developed by the federal agencies responsible for enforcing title VII. The Guidelines define the selection procedures to which the disparate impact standard applies as "[a]ny measure, combination of measures, or procedure used as a basis for any employment decision." 29 C.F.R. § 1607.16(Q). (Emphasis added.)

The second question asked by Senator Jeffords was:

At page five of your written testimony you comment that past practices of the federal and state governments created racial animus and bred among whites feel-

ings of hostility toward blacks. What, if any, impact do you see this legislation having on race relations?

My remarks were directed to the state and federal laws which required segregation prior to 1954, the Court cases which upheld such laws and struck down or ignored the early civil rights statute which prohibited segregation and the attitudes of state and federal officials who supported racial segregation despite the 13th, 14th and 15th Amendments.

The public today understands full well that the U.S. Supreme Court decisions to which S. 2104 is directed overturned previously well established civil rights decision and protections. What remains unresolved in the public mind is whether that development was a transitory aberration or an abandonment by the federal government—and the nation —of its hard won commitment to ending all forms of invidious discrimination. Enactment of S. 2104 will send a message from Congress, the people's representative, and the President, if he signs it, the one charged with articulating the nation's conscience, that that commitment remains unshaken and that Congress stands ready and willing to intervene whenever actions by the other branches of government require. No single piece of legislation can or will resolve the complex suspicions, fears and misunderstandings that have built up between the races over four centuries. But every time Congress acts to further strengthen and refine the legal protections against discrimination, it gives minorities and women greater hope of fair treatment, and, by example, teaches all Americans the importance of tolerance and understanding. I do not think I am in the minority or naive when I believe that most Americans, including whites, favor the end of all racial segregation and the eradication of the effects thereof and thus feel good when the nation's institutions, Congress or the courts or the President take steps to correct action which slows up or reverses the trend towards full equality and freedom which started with Presidents Truman, Kennedy and Johnson and the U.S. Supreme Court's Brown decision and the other actions set forth on pp. 6–7 of my written testimony.

Please let me know if I can provide you with any additional information.

Sincerely,
William T. Coleman, Jr.

Honorable EDWARD M. KENNEDY
Chairman, Senate Committee
on Labor and Human Resources
U.S. Senate
Washington, DC 20510

DEAR MR. CHAIRMAN: In the letter I sent you on March 26, 1990, I would like to amend my remarks to include Presidents Eisenhower, Nixon and Ford among the post-1945 Presidents who contributed toward the trend to full eqality and freedom. I would add President Eisenhower not only because he was the one who appointed Chief Justice Earl Warren, ended segregation among civilian employees of the Navy and in the District of Columbia, signed the 1957 Civil Rights Act but also because he did back up the federal court in the *Little Rock* case and although some say that he should have been more vocal in support of *Brown* he did place the duty to follow the decision even if one disagreed with it on the high ground that in a democratic society one must follow the law.

President Nixon deserves to be included as he did support the Philadelphia Plan and his appointees, Chief Justice Burger, Justice Powell and Justice Blackmun did continue to give weight and content to *Brown* and the various civil rights legislation.

President Ford, who I had the pleasure to serve with in his Cabinet, stood firm in the Roston School case, supported civil rights legislation when minority leader in the House, and certainly recognized that the government should be active in attempting to eradicate the effects of racial and sexual discrimination. He also elected Justice Stevens who has performed well in the area of civil rights.

I would appreciate it if you would pass this letter on to Senator Jeffords and also give it to anyone who got the original letter dated March 26, 1990.

With kindest regards,

Sincerely,
William T. Coleman, Jr.

The CHAIRMAN. Judge Hufstedler.

Ms. HUFSTEDLER. I am very pleased to have the opportunity to speak on behalf of the Civil Rights Act of 1990.

More than 25 years ago, you charted a course to help lead the Nation to recognize the right and the intrinsic ability of all men and women regardless of sex, race, religion, national origin, or ethnicity, to have an equal opportunity to contribute their talents and labor to the economic growth, development, and well-being of this Nation.

When Title VII of the Civil Rights Act of 1964 was passed, discrimination in the workplace was flourishing. After title VII was passed, despite the fact that it has not been totally adequate, very significant changes were made in the opportunities for women and minorities to enter into the life of this country in labors that were equivalent to those of white men.

Although we have unquestionably made progress since 1964 in trying to eradicate discrimination in the workplace, we still have a long way to go, because we still have situations in which women are being systematically excluded from equal opportunity, in which the same problems to which my colleague, Bill Coleman, addressed himself is flourishing.

Take a look at the plantation economy in *Wards Cove*. It looks very much like the Old South did before the Civil Rights Act became effective.

Today, many businesses now realize that it is not simply an act of kindness, it is a matter of good business to hire and to promote all the minorities and women to which I earlier adverted. But that does not mean that all employers are thus enlightened, because they clearly are not.

One of the major problems facing the country is the failure of so many Americans to realize what the demographics are now, what the workforce is like in the decade of the 1990's, what the workforce is going to be like in the succeeding decades after the year 2000.

In the year 2000, over 60 percent of women will be in the labor force, and they will comprise 47 percent of the whole workforce. Today, 72 percent of all mothers of school-age children are working outside their homes. Only 55 percent did so in 1975.

More than half of all married women with very small children now are in the labor force. Almost 60 percent of married women live in families in which both the husband and the wife are employed outside the home.

Women, like men, work for money. They have always worked, of course. The only real difference is that now they would like to get paid for it.

Moreover, they need the money, just like men need the money, to support themselves and to sustain their families. Employment discrimination causes grievous harm to working women.

No one can realistically remain unscathed when he or she is being subjected to discrimination, whether that discrimination is blatant or whether it is subtle.

Women of color are doubly burdened by both gender and race. Handicapping employed mothers handicaps their children as well. The children who are those of working mothers are being disproportionately supported by single-parent families. And of that group, the most over represented are black women.

The Civil Rights Act of 1990 is designed to accomplish two purposes: First, to overturn the decisions earlier mentioned which set the course of civil rights on a devout course exactly backwards; and the second is to harmonize and to make more effective both section 1981 and title VII.

I would like, please, to discuss with you very briefly—I have discussed these cases at some length in my written testimony—two of these cases. One of them is *Martin* v. *Wilks*.

Martin v. *Wilks* is a case in which a group of white firefighters sued the city of Birmingham, AL, when, for the first time in the history of the city, a black man became a lieutenant in the firefighting unit. The city promoted that black man to the position as a result of the settlement affirmed by decree of the Court that urged and qualified these individuals for promotion and entry into what had been a totally racially segregated force.

There was no basis at all upon which the judgment itself was invalid. The issue was not whether the white firefighters were technically bound by the judgment. They were not, because they had not been party to the action nor had they been heard with respect to it.

Rather, the question was whether that decree should be treated as if it never even existed or whether the city could rely on it as a defense to support its action with respect to the promotion of that black firefighter.

The U.S. Supreme Court of the United States in, again, a narrowly divided vote, said that collateral attack would be permissible. The result is, and it is very well documented, that now there is no possibility of any finality with respect to a decree in a title VII case which is rendered either following lengthy negotiations and consent or after a fully litigated case.

Senator, there always has been a tension between the constitutionally secured right to a full and fair opportunity for a hearing and the concerns of finality of judgments. There is nothing extraordinarily novel about what this statute purports to do. It operates like class actions do in many other areas today. The Court itself recognized that there was no constitutional inhibition on changing the legislation to meet the special needs in these cases.

What this legislation does is to set up an orderly system in which to grant the widest possible notice and opportunity to be heard for everyone who believes that he or she might be aggrieved.

But when all those things have been aired, that should be the end of it. This legislation does not change the well-settled law with respect to those particular grounds which are available to collaterally attack judgments.

It does not do that. What it does is make it possible to settle cases. After all, one of the principal reasons of title VII was to en-

courage voluntary compliance with the law. The result of this is that every time a woman in a traditionally male occupation or a man who is black or who is racially other than the majority can have that right challenged again and again and again.

What kind of employers are going to be willing to go through months, ofttimes in this case years, of litigation, reach a settlement, and then have to have it challenged over and over again indefinitely? That situation is changed, and it should be changed in a solid and orderly way by the provisions of the statute.

I want to mention very briefly a case which has earlier been discussed, and that is the *Lorance* case. In *Lorance*, the plaintiff was defeated by the U.S. Supreme Court of the United States because, the Court held, that a change in policy which affected seniority systems and adversely impacted women, could not be challenged after the current 180-day limitations period with limitations commencing to run as of the time the policy was changed, not when the harm was created.

Under that decision, it should be obvious that only under the most fortuitous circumstances can one ever effectively challenge such a discriminatory rule. It is only in a situation where a person is actually hurt within 180 days of the time a policy has been changed that there is any remedy at all. That makes no sense from the standpoint of the administration of justice, and at least the administration has expressed itself as agreeing on that principle.

Finally, I would like to point out that the bill makes some very important changes which harmonizes the law more in keeping with the lofty remedial purposes of the statute. One, section 1981 has and does provide both damages compensatory and punitive, to be applied in a particular case.

Title VII, on the other hand, provides for no damages, even when the circumstances are very egregious—none. There is instance after instance in which women and men who are minorities have been harassed on the job, have been driven to serious illness or physical injury, and they have no remedy at all.

What the law gives them is an opportunity for the Court to tell the employer to stop it in the future or—and what a melancholy remedy that is—they can be reinstated to an abusive workplace and, in some instances, they can have backpay. That is not fair, and this bill, if enacted, would change it.

Second, the bill also bring, by amendment, 1981 up to date, as earlier indicated, again with the support of the administration, to change the law so that harassment and other unacceptable workplace behavior is covered by the statute. That is only just.

What this bill does is try to move this Nation by action into what is said to be its commitment. It is time the Nation kept its promise that this should be a Nation which is not only a free Nation but one that provides justice for all Americans in the workplace.

Thank you.

The CHAIRMAN. Very fine.

[The prepared statement of Ms. Hufstedler follows:]

PREPARED STATEMENT OF SHIRLEY M. HUFSTEDLER

My name is Shirley M. Hufstedler. I was admitted to the Bar in January, 1950, and for the next 10 years I was in private practice of law. I then became Special

Legal Consultant to the Attorney General of California in the complex litigation in the United States Supreme Court over the rights to the Colorado River, *Arizona v. California*. In 1961 I was appointed Judge of the Los Angeles County Superior Court, a trial court of general jurisdiction; I was thereafter elected to that Court. In 1966, I was appointed Associate Justice of the California Court of Appeal, a position in which I served until 1968 when President Johnson appointed me United States Circuit Judge, United States Court of Appeals for the Ninth Circuit. I resigned from the Bench in 1979 when the Senate confirmed President Carter's nomination of me as the nation's first Secretary of Education. When I returned to private life in 1981, I became a partner in the firm Hufstedler, Miller, Carlson & Beardsley (now Hufstedler, Miller, Kaus & Beardsley) in Los Angeles, with time out to teach for a semester as Phleger Professor of Law at Stanford Law School and to lecture in other universities and colleges throughout the United States and abroad.

I currently serve as a director of Hewlett Packard Company, U S West, Inc., and Harman International Industries. I am also a director of the John D. and Catherine T. MacArthur Foundation and a member of the board of trustees of a number of educational and philanthropic institutions.

It is a pleasure to appear before you today to testify in support of Senate Bill No. 2104, the Civil Rights Act of 1990, and to state why this bill should be promptly enacted.

More than 25 years ago, you charted a course to lead the Nation to recognize the right and the intrinsic ability of all men and women—regardless of sex, race, color, national origin or religion—to have an equal opportunity to contribute their talents and labor to our economic growth, development, and well being. When title VII of the Civil Rights Act of 1964 [1] was enacted, invidious discrimination was flourishing against women, racial, ethnic and religious minorities in the workplace. Although title VII was not adequate in all respects, it had a significant and positive impact in reducing intentional discrimination and artificial barriers that had blocked the entry of women and minorities into many factories and offices. Until 1989, the federal judiciary usually promoted the lofty remedial purposes of the antidiscrimination laws. In 1972, title VII was extended to governmental offices, schools, colleges and universities. The effect was significant improvement in employment diversity in both governmental and educational institutions.

Although we have unquestionably made progress since 1964 in ending employment discrimination, we have much more to do before we can say that equal employment opportunity truly exists for all Americans. Discrimination against women and minorities continues to haunt private and publicly held corporations, police and fire departments, schools, colleges, industrial plants and factories. The sting of discrimination is still felt by women and racial minorities who have attained the highest educational levels. Even with professional degrees and academic honors, women are subjected to sexual harassment on the job, denied promotions because they are women, restricted to jobs that are deemed to be "women's work," and paid less than their peers.

Since 1964, enlightened employers have realized that discrimination is not good business and that eliminating discriminatory policies and practices gives them a more productive work force. However, all employers have not shared that enlightenment. Despite the good examples, far too many employers are immune from the existing law. Far too many fail to appreciate the impact of demographics on their businesses now and in the next decades.

Today, almost half of all workers are women. In 1987 and the first half of 1988, women accounted for 45 percent of all employed workers. Exactly half of the African-American work force and 39.5 percent of the Hispanic work force are women. In some places, the numbers are even higher: in the District of Columbia, for instance, women make up more than half the total work force.[2] Women's entry into the labor force will escalate between 1985 and 2000. By the year 2000, over 60 percent of women will be in the labor force, and they will comprise 47 percent of the total work force. Today, 72 percent of all mothers of school-age children work outside their homes. Only 55 percent did so in 1975. More than half of all married women with very small children now work outside their homes. In almost 60 percent of 2-parent families, both parents work.[3]

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[1] 42 U.S.C. §§ 2000e, *et seq.*

[2] Women's Bureau, Office of the Secretary, U.S. Dept. of Labor, *Twenty Facts On Women Workers*, Fact Sheet No. 88-2,1 (1988); J. Outtz, *Washington Women in the Labor Force: The Year 2000 is Now*, 4 (1989). *See also Workforce 2000* at 85, Table 3-4, predicting women's share of the workforce at 45.8 percent in 1990.

[3] *Occupational Segregation: Understanding the Economic Crisis for Women* 2 (Chicago: Women Employed Institute, 1988).

Women, like men, work for money because they and their families need paychecks to survive. Employment discrimination causes grievous suffering for working women. No one can realistically remain unscathed when she or he is subjected to discrimination whether blatant or subtle. Women of color are doubly burdened by race and gender. They also occupy the lowest paying jobs among all workers, and they are disproportionately raising children alone. Handicapping mothers in employment cruelly discriminates against their children as well.

Women, racial and ethnic minorities constitute the segment of the American labor force that will increase the most significantly in the next several decades. If they are to support themselves and contribute to the economic well being of the nation, they must have educational opportunities, job training, the chance for employment and jobs that will tap their full potential as workers. We cannot tolerate discriminatory treatment of women and minorities in the workplace. Equitable treatment of women and minorities is not merely an amenity—it is a national necessity.

The Civil Rights Act of 1990 is designed to accomplish two purposes: (1) to repair the serious damage to justice in employment caused by several cases decided by the United States Supreme Court last term, including: *Wards Cove Packing Co.* v. *Atonio, Martin* v. *Wilks, Lorance* v. *AT&T Technologies, Patterson* v. *McLean, Price Waterhouse* v. *Hopkins,* and *Independent Federation of Flight Attendants* v. *Zipes,* and (2) to correct inadequacies in title VII and in the Civil Rights Act of 1866 that pre-existed the destruction wrought by the U.S. Supreme Court.

First, I shall describe briefly those six cases and the provisions of the act drafted to overturn them; thereafter I will discuss the reasons for curing the deficiencies in the existing legislation to provide effective remedies for employment discrimination.

Wards Cove Packing Co., Inc. v. *Atonio,* 490 U.S. ——, 104 L.Ed.2D 733, 109 S.Ct. —— (June 5, 1989). In a remote area of Alaska, salmon canneries maintained a highly racially segregated workforce. The skilled, high paying jobs were exclusively reserved to whites; non-whites were relegated to unskilled, low paying jobs. The canneries provided segregated eating and sleeping facilities for the skilled and unskilled workers. The non-white workers in the "plantation economy" sued their employers charging employment discrimination on the basis of race in violation of Title VII of the Civil Rights Act of 1964 because their employers' policies and practices had a disparate impact on national origin minority workers.

Eighteen years before *Wards Cove* was decided, the U.S. Supreme Court had unanimously held, in *Griggs* v. *Duke Power Co.*,[4] that employees could establish employment discrimination forbidden by title VII upon proof that facially neutral policies and practices disproportionately impacted national origin minority workers. (An example of such a practice is a police department regulation imposing a height and weight minimum (for example, 5'7" and 135 pounds) on all police officers. Although such a requirement is not on its face discriminatory, it in fact operates to exclude the majority of women.)

Before *Wards Cove,* a victim could successfully challenge such a practice if she showed that the height and weight requirements barred most women from employment, and the police department could not prove that the requirements were necessary for essential operation of its business. In addition, often an entire group of employment practices such as narrow recruitment techniques, strength and agility tests, paper and pencil tests, requiring substantial work experience for entry level positions, act together to discriminate against women. Before *Wards Cove,* a plaintiff could win if she could show that, as a group, these employment practices had a discriminatory impact, and the employer could not justify them as necessary.

The majority in *Wards Cove* (5–4) effectively destroyed Griggs by increasing the employees' burden of proof and lessening the employers'. Under *Wards Cove,* a victim of employment discrimination can no longer challenge a group of practices by showing their cumulative effect. Now she must prove the discriminatory impact of each and every practice—a costly burden and one that can rarely be met. An employer can prevail without proving that his practices are necessary to operate the business; the employer need only come up with some kind of plausible business reason for having the practice.

Changing the burden of proof in litigation is not exciting news to a lay person, but to lawyers and litigants it is all the difference between success and failure. For example, a woman in Illinois was denied the opportunity to become a firefighter when the score of one test of agility was arbitrarily adjusted upward. When she first took the test, she passed. She was not among those hired that year, and she tried

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[4] 401 U.S. 424, 28 L.Ed.2d 158, 91 S.Ct. 849 (1971).

again two years later. She failed the second time although she had improved her performance on the test. The city provided no justification for changing the scoring standard. The steeper scoring proved to have a grossly disproportionate impact on women applicants. In 1983, less than 13 percent of the female applicants passed the test, compared with 93 percent of male applicants. As of 1988, no women were among Evanston, Illinois firefighters. Ruling before *Wards Cove*, the district court found that the employee and the members of her class had proved discriminatory impact and awarded her relief. The court of appeals vacated the decision after *Wards Cove* because the U.S. Supreme Court, like Evanston, Illinois, had raised the entry barrier higher for her and for all women who aspired to jobs gendered male.[5]

Martin v. *Wilks*, 490 U.S. ——, 109, S.Ct. ——, 104 L.Ed.2d 835 (June 12, 1989). A group of white firefighters sued the City of Birmingham, Alabama when, for the first time in its history, the city promoted a black man to the position of lieutenant in the fire department. The city's promotion decision was made pursuant to a consent decree entered to settle a prior lawsuit brought by blacks against the city charging racially discriminatory hiring and promotion practices in violation of Title VII of the Civil Rights Act of 1964.

White firefighters brought this action against the city charging reverse discrimination claiming that the city was precluded from defending its employment decisions relying on the consent decree. The white firefighters knew about the prior suit when it was being litigated, and they were content to sit on the sidelines without intervention. No basis existed for challenging the validity of the consent decree. It was undisputed that the white firefighters were not bound by the prior judgment because they were neither parties to the action nor were they represented by persons who were parties. The question was whether the white firefighters could charge the city with discrimination against them as if the prior judgment did not exist. The majority of the Court (5–4) rejected the city's contention that the promotions were immunized from challenge if the promotion was either required or permitted by the terms of the prior decree. The result is to destroy any reliance on consent decrees or judgments entered after trial on the merits in employment discrimination cases. The black firefighters following *Martin* v. *Wilks* will have to retain lawyers anew—if they can find any to take their cases—to defend what they thought they had already won.

The outcome is inconsistent with the purposes of title VII as enacted in 1964, and amended in 1972. Title VII was intended to encourage voluntary compliance. How many employers will risk settling a discrimination case and implementing remedial plans when the outcome is likely to be multiple challenges to the settlement and relitigation of the underlying claims, again and again?

For women struggling to enter jobs formerly classified as male only and for those who seek promotion if they have somehow managed to climb over the entry barriers, it means that court approved plans similar to that involved in *Martin* v. *Wilks* are subject to challenge every time a woman is hired or promoted pursuant to court order. For example, court ordered remedies to correct discrimination against women in the San Francisco Police Department, the North Carolina Highway Patrol, and virtually all of Memphis, Tennessee city jobs are subject to challenge in court each time an attempt is made to implement them as a result of this decision. The damage does not end there. Non-parties or "sideline sitters" have been given the means by the majority of the U.S. Supreme Court to launch repeated challenges to final court orders unrestricted by any time limits. The decision thwarts congressional will in enacting title VII, and it generates needless litigation in courts already reeling from case overloads.

Since the U.S. Supreme Court decision in *Wilks*, new "reverse discrimination" cases have been spawned in numerous localities including Birmingham, Alabama; Boston, Massachusetts; Oakland, California; Cincinnati, Ohio; San Francisco, California; and Toledo, Ohio among others. The Birmingham firefighters' case is proceeding anew in the district court after the U.S. Supreme Court's decision in favor of the white firefighters ability to challenge the consent decree. In addition to numerous interventions of new plaintiffs in the existing litigation, another case has been initiated. Two white deputy sheriffs working for the Jefferson County Sheriff filed a lawsuit alleging race and sex discrimination against them because blacks and women were finally promoted in more than token numbers to the first-level of supervision in the Sheriff's Department. The plaintiffs in the new case claim that the

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[5] *Evans* v. *City of Evanston*, 881 F.2d 382 (7th Cir. 1989).

consent decree with Jefferson County, Alabama, entered in March 1983 in the original *Martin* litigation and the 1981 personnel board decree are unlawful.[6]

Three "reverse discrimination" suits were filed in Boston in the early fall of 1989—all attempting to reopen longstanding consent decrees, which in turn had ended years of litigation.[7] One month after *Wilks*, a lawsuit was filed by white and hispanic male applicants for firefighter positions in Oakland, California, alleging that a May 1986 consent decree unlawfully discriminates against them on the basis of race and gender. The lawsuit specifically states that it was being brought pursuant to the *Wilks* decision as a collateral attack on the 1986 consent decree.[8]

Two "reverse discrimination" cases are now pending against the City of Cincinnati because of *Martin* v. *Wilks*.[9] The first was filed before the court decided *Wilks*, but it received new life as a result of the decision despite previous Sixth Circuit rulings against collateral attacks. The second case was filed after the *Wilks* decision and alleges race and sex discrimination against white males in police department hiring because of what the plaintiff contends is a misapplication of a 1981 consent decree. Four new "reverse discrimination" cases have been filed against the City of San Francisco since *Martin* v. *Wilks* was decided. The four involve the fire department, the police department, the public school system and the community college system.[10] These cases continue indefinitely already lengthy litigation over discrimination in the City of San Francisco. In January, 1990, in Toledo, Ohio, white applicants for firefighter positions with the City of Toledo filed a lawsuit alleging that they should have been appointed to firefighter positions under their interpretation of a 1974 consent decree.[11] They have asserted that they were not parties to an August 1989 court order which modified the way hiring for black and white firefighter trainees was done under the decree.[12]

The initiation of these lawsuits dramatically illustrates the dilemma posed by the Court in its selection of the Rule 19 mandatory joinder alternative as the solution to the *Martin* v. *Wilks* controversy. Non-parties or "sideline sitters" have been given the wherewithal by the Court to launch repeated challenges to final court orders, unrestricted by time limits.

Tension always exists between the finality of judgments and correction of errors in judgments, between parties to litigation and non-parties who may be adversely affected by the decision. Remedial decrees in employment discrimination cases almost always remove advantages enjoyed by one group in favor of correcting inequities to another. The law of judgments is complex because the law seeks both to protect the constitutionally secured right to an opportunity to be heard and the fi-

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[6] *Williams* v. *Bailey*, CV 89-PT-1241-S (N.D. Ala.). The portion of the case which went to the U.S. Supreme Court in *Martin* v. *Wilks* did not include any claims arising out of the County Consent Decree, *United States* v. *Jefferson County*, 28 FEP Cases 1834 (1981), 720 F.2d 1511 (11th Cir. 1983) (denial of intervention affirmed on appeal).

[7] *Mackin et al.* v. *City of Boston et al.*, Civil Action No. 89-2025-N challenges the Consent Decree entered in *Boston Chapter NAACP* v. *Beecher*, 371 F. Supp. 507 (D. Mass. 424 (1974), *aff'd* 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 424 (1975); *Fagan et al.* v. *City of Boston, et al.*, Civil Action No. 89-2076-N challenges the Consent Decree entered in *Castro* v. *Beecher*, 365 F. Supp. 655 (D. Mass. 1973); *Stuart et al.* v. *Roach et al.*, No. 89-2348 Mc. challenges the Consent Decree dated October 31, 1985 in *Massachusetts Association of Afro American Police. Inc. (MAAAP)* v. *Boston Police Department*, 106 F.R.D. (D. Mass. 1985), *aff'd* 780 F.2d 5 (1st Cir. 19885) *cert. denied*, 478 U.S. 1020 (1986).

[8] Complaint in *Peterson et al.* v. *The City of Oakland, California, et al.*, C-89-2784-WHO (N.D. Cal., July 27, 1989), para. 5 and para. 6, p. 3.

[9] *Jansen et al.* v. *The City of Cincinnati et al.*, C-1-89-079, (S.D. Ohio, February 2, 1989); *Vogel* v. *City of Cincinnati*, No. C1-89-683 (S.D. Ohio, November 14, 1989).

[10] *Van Pool* v. *City and County of San Francisco*, No. 903108 (Superior Court for the City and County of San Francisco), *Van Pool* challenges the Consent Decree entered in *U.S. and Davis* v. *San Francisco*, 656 F.Supp. 276 (N.D. Cal. 1987), *aff'd*, 890 F.2d 1438 (9th Cir. 1989); *Ratti* v. *The City and County of San Francisco*, No. 911141 (Superior Court of California for the City and County of San Francisco), *Ratti* challenges the decree entered in *Officers for Justice* v. *City and County of San Francisco*, 473 F.Supp. 801 (N.D. Cal. 1979), *aff'd*, 688 F.2d 615 (9th Cir. 1982), *cert. denied sub nom Byrd* v. *Civil Service Commission of the City and County of San Francisco*, 459 U.S. 1217 (1983); *Davis et al.* v. *The City and County of San Francisco et al.*, C-915348 (Superior Court of California for the City and County of San Francisco), *Davis* challenged a 1983 Consent Decree in *San Francisco NAACP et al.* v. *San Francisco Unified School District*, 78-1445-WHO (N.D. Cal. 1983); *Fowler et al.* v. *The City and County of San Francisco et al.*, No. 915350 (Superior Court of California for the City and County of San Francisco).

[11] *Bembenek et al.* v. *Winkle. et al.*, 3:90 CV-7016 (N.D. Ohio (January 16, 1990)). The Consent Decree at issue was originally entered in 1974 resolving an action filed seventeen years ago. *See, Brown* v. *Neeb*, 664 F.2d 551 (N.D. Ohio 1981).

[12] The Consent Decree has been modified from time to time by the court with the latest revision being August 21, 1989. *Brown* v. *Winkle*, C 72-282 (N.D. Ohio 1989).

nality of judgments. Judges are not free to rewrite the law of judgments nor, in federal courts, can judges fail to observe the rules established by the Federal Rules of Civil Procedure and other applicable statutes. In *Wilks*, an important underlying issue was a dispute about the meaning of Rules 19 and 24 of the Federal Rules of Civil Procedure governing the circumstances under which mandatory joinder of third parties must occur and when non-parties are obligated to intervene to protect their rights. Until *Wilks*, most courts of appeals held that all third parties were foreclosed from collaterally attacking consent or litigated decrees, except in very limited circumstances, whether or not they had notice and an opportunity to be heard before the decree was entered.[13] Under *Wilks*, however, every single white firefighter is able to bring a separate lawsuit to challenge the decree, even if the decree had already been approved in multiple prior challenges. The U.S. Supreme Court recognized that Congress had the power to fashion other solutions in this situation.

Section 6 is drafted to accommodate both the policy of finality and the right to be heard. Section 6 requires the person who is potentially aggrieved to challenge the decree before it becomes binding, rather than years later. It also provides interested third parties an opportunity to present the same statutory or constitutional objections to a decree that they could, under *Wilks*, present years later. Once those objections have been fully aired, there is no reason to permit the same arguments to be made over and over again.

Section 6 also seeks to provide notice to third parties in a variety of ways. As judges know from their experience with Rule 23 governing class action suits, many practical problems can arise in giving notices of this kind that are solved by reasoned discretion of district judges. Section 6 makes clear that it does nothing to disturb Federal Rule 24 concerning the right to intervene, and it does nothing to disturb the usual rules by which collateral attack on judgments is permitted.

Lorance v. *AT&T Technologies Inc.*, 490 U.S. ——, 104 L.Ed.2d 961, 109 S.Ct. —— (June 12, 1989). Ms. Lorance started work as an hourly wage employee. Later she was promoted to a more highly paid, formerly all-male, skilled position. When she and many other women were moving into these skilled positions for the first time in 1979, the employer adopted a new seniority policy, facially neutral, that, as applied, discriminated against women. The new policy did not affect her until 1982, when her relatively low seniority under the policy caused her to be demoted. She and those employees similarly situated would not have been demoted under the old seniority system. The lower courts held that the 180-day limitations period within which to bring discrimination charges under title VII began to run when Ms. Lorance lost her plant-wide seniority rights under the new system. The U.S. Supreme Court (5–3 [14]) reversed, holding that the limitations period began to run as soon as the new system was adopted.

The plurality opinion places intolerable burdens on employees who are victims of discriminatory practices and on an overburdened judicial system as well. It is difficult to understand how employees who have no reason to believe they will suffer any harm from a new promotions or hiring policy can ever successfully challenge a discriminatory system unless the particular employee's harm fortuitously occurs within the limitation period. Moreover, it is extremely difficult to figure out effective remedies for employees who are unable to show that they suffered any harm from a policy that did not apply to them when a challenge is made. The decision requires employees to fight battles when threats are no more than shadows. This decision makes sense only if the purpose of the title VII limitations provision was to cripple or to destroy the statutory rights of those who seek to invoke the statute's protection.

How many women and minority employees who, at last, have found a job, are going to have employment opportunities if they are required by law to fight their employers every time they create a policy that may someday adversely affect them? How many have the financial or the emotional resources to work in an environment that requires constant fighting? How many will challenge those policies when, even if they win, they can lose again and again because *Wilks* permits white males to reopen the issues indefinitely?

Section 6 of the Act overturns *Lorance*, and lengthens the time for filing a discrimination complaint. The time for filing a complaint begins to run from the date a discriminatory practice has adversely affected the victim. The Act also recognizes

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[13] For a summary of the circumstances under which a non-party may collaterally attack a consent or litigated decree before *Wilks*, *see, e.g.*, F. James & G. Hazzard, Civil Procedure (3d ed. 1985) § 12.15, p. 681.

[14] Justice O'Connor did not participate.

the special consideration that Congress extends to seniority plans under title VII [15] and describes the circumstances under which a seniority system, adopted as part of a collective bargaining agreement, may be challenged as an unlawful employment practice.

Independent Federation of Flight Attendants v. *Zipes*, 491 U.S. ——, 105 L.Ed.2d 639, 109 S.Ct. —— (June 22, 1989). A group of female flight attendants of TWA, represented by their union, filed suit against the airline claiming that the airline's policy of terminating flight attendants who became mothers, but not those who became fathers, violated title VII's prohibition against sex discrimination. TWA then abandoned its policy and entered into a settlement agreement, which was approved by the district court. Following an appeal by class members who were dissatisfied with the settlement, the district court granted summary judgment to the women flight attendants concluding that the policy violated title VII. The airline and the flight attendants again reached a settlement in which the airline agreed to establish a $3 million fund to benefit all class members and to credit class members with full company and union "competitive" seniority from the date of the termination.

At this point, a new union replaced the former union as collective bargaining agent for the flight attendants. The union challenged the settlement on behalf of flight attendants who were not members of the class on the grounds, among others, that full retroactive "competitive seniority" violated the collective bargaining agreement between the members unaffected by the discriminating policy and the airline. The settlement agreement was again approved. The prevailing women attendants' attorneys petitioned the district court for an award of attorneys' fees against the intervening union.

The district court awarded such fees, the court of appeals affirmed, and the U.S. Supreme Court granted review. With a hypertechnical reading of Title VII, the U.S. Supreme Court (5–4) held that no attorneys' fees could be awarded against an unsuccessful intervenor unless the intervenor's action was frivolous, unreasonable, or without foundation. In dissent, Justice Marshall pointed out that the result of the decision will be that defendants can rely on intervenors to raise many of their defenses, thereby limiting the defendants' exposure to attorneys' fees and forcing prevailing plaintiffs to litigate many, if not most of their claims against parties against whom they have no chance of recovering fees, thereby significantly restricting the use of private attorneys general to enforce the law.

Section 9 restores the district court's discretion to award attorneys' fees to the victim of discrimination who prevails in the original action, together with other litigation expenses, reasonably incurred in defending such judgment or order as a party, intervenor or otherwise.

Patterson v. *McLean Credit Union*, 491 U.S. ——, 109 S.Ct. ——, 105 L.Ed.2d 132 (June 15, 1989). Ms. Patterson was employed as a bank teller and was thereafter subject to racial harassment on the job. The firm's president repeatedly told her that "blacks are known to work slower than whites by nature." She was given demeaning tasks that white workers were not. She was the only clerical worker who was required to dust and sweep. She brought this action under the 1866 Civil War Statute (42 U.S.C. § 1981) which prohibits racial discrimination in the making and enforcement of contracts.[16]

Ms. Patterson brought the action contending that her employer had harassed her, failed to promote her, and then discharged her because of her race. The district court held that racial harassment is not actionable under § 1981. The court also instructed the jury that in order to prevail on her promotion-discrimination claim, she had to prove that she was better qualified than the white employee who received the promotion. The jury found for the employer, and the court of appeals affirmed.

Two important issues were raised before the U.S. Supreme Court. On its own motion, the U.S. Supreme Court ordered the parties to brief the question whether the U.S. Supreme Court should overrule its decision in *Runyon* v. *McCrary*, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976) holding that § 1981 prohibits racial discrimination in making and enforcing private contracts. The second issue was raised by Ms. Patterson: is racial harassment on the job a violation of § 1981?

The court unanimously decided that it would not overturn *Runyon* v. *McCrary*, and that the district court erred in instructing the jury that Ms. Patterson had to

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[15] Section 703(h) of Title VII, 42 U.S.C. § 2000e–2(h).

[16] Unlike title VII, § 1981 covers all employers and employment contracts, whereas title VII covers only employers with 15 or more employees.

Section 1981 permits recovery of damages against those found in violation of the statute. By contrast, title VII remedies are limited to injunctive or declaratory relief and backpay.

prove that she was better qualified than the white employee who received the promotion in her stead. The majority held that § 1981 applied only to the employment contract and not to harassment after the contract had been formed. The dissenting justices believed that the language of § 1981 was roomy enough to accommodate a sexual harassment claim if the plaintiff was able to demonstrate to the satisfaction of a jury that she worked under conditions substantially different from those enjoyed by white employees similarly situated because a jury could infer from such evidence that the employer did not make the same kind of employment contract with blacks as with whites.

Since *Patterson*, a number of decisions have been handed down that vividly illustrate the plight of women subjected to sexual harassment for whom neither title VII nor § 1981 provides any relief. For example, in *Brooms* v. *Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989), a 36-year old black female who had been employed as an industrial nurse at the company had been subjected to gross racial and sexual exploitation. Her supervisor displayed illustrations of interracial sexual acts and told her that she was hired to perform the sexual acts depicted. On another occasion, her supervisor threatened to kill her. Brooms fled screaming and suffered a fall down a flight of stairs. She thereupon suffered a severe depression which left her unable to work on a permanent basis for several years. The litigation was pending in the Seventh Circuit when *Patterson* was decided, and the court of appeals summarily dismissed the complaint on the ground that this conduct did not affect the initial formation of the contract and was therefore not actionable under § 1981.

The need to correct *Patterson* also helped to focus attention on the need to strengthen title VII to provide adequate remedies to all victims of intentional employment discrimination against protected classes. Under title VII, the most that a proven discrimination victim can expect is reinstatement to her job if she was wrongfully discharged, denied a promotion or not hired in the first place; a court may enjoin her employer to stop discriminating and/or award no more than two years of backpay if she can show that the discrimination caused her to lose wages. Title VII provides no possibility of recovering damages to compensate victims of discrimination for severe health or medical injuries and the emotional distress caused by the mistreatment. Yet, these are precisely the kinds of injuries that are directly traceable to prohibited discrimination, and they occur either in the absence of, or in addition to loss of income.

Men, as well as women, severely suffer from mistreatment. For example, James Williams was subjected to racial slurs, "jokes," and "pranks," such as posting a Klu Klux Klan application on the company bulletin board. Although the trial court found that Williams' employer had violated title VII, the court could not award Williams damages for his emotional distress and psychological problems which resulted from his harassment. *Williams* v. *Atchison, Topeka & Santa Fe Railway*, 627 F.Supp. 752 (W.D. Mo. 1986).

Rodney Compston, a millwright, got along very well with his supervisor until he discovered that Compston was Jewish. After that, the supervisor called him "goddamned Jew," "kike," and "Christ Killer" in front of his co-workers. The court stated its regret in being unable to award him damages under title VII because it was apparent from the evidence that Compston suffered mental anguish and humiliation at the defendant's hands. *Compston* v. *Borden, Inc.*, 424 F.Supp. 157 (S.D. Ohio 1976).

Employees like these are in a "catch-22" situation. If they stay on the job and submit to the abuse, they get no recompense for the harm they sustain. If they are ultimately driven to quitting their jobs, they bear a heavy burden to prove that they were "constructively discharged," and, even if they ultimately prevail, they still have no remedy for the discriminatory conduct except reinstatement in an abusive environment and backpay.

Although under some state tort laws, victims of intentional discrimination may have a remedy, such laws can hardly be viewed as an adequate alternative to a damages remedy under title VII. Invidious employment discrimination is a national problem, and it requires uniform national solutions by federal statute.

Section 12 of the Civil Rights Act of 1990 amends § 1981 by expressly expanding the definition of "the right to 'make and enforce contracts' " to include the performance of and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

As necessary as it is to amend § 1981, it cannot do the entire task. Section 1981 applies only to race and national origin discrimination. Compensatory damages would not be available under that statute to white women or men discriminated against on nonracial or ethnic grounds. Moreover, § 1981 does not contain the desirable conciliation process incorporated into title VII.

Section 8 of the Civil Rights Act of 1990 recognizes the anomaly that would exist in the federal antidiscrimination laws if § 1981 were to be amended to permit damage awards in the case of intentional racial discrimination while providing only limited, and often inadequate, remedies to women and religious minorities under title VII. Therefore, the Act amends title VII so that victims of intentional discrimination can seek both compensatory damages, which redress their medical and emotional injuries, and punitive damages, which are levied against some wrongdoers for particularly egregious discrimination. It is important to remember that damages are an important aspect of promoting the larger purpose of title VII for two reasons: (1) they compensate discrimination victims for the harms they have suffered, and (2) they deter employers from intentionally discriminating, because they know that discrimination carries a price tag, not just a slap on the wrist.

Price Waterhouse v. *Hopkins*, 490 U.S. ——, 109 S.Ct. 1775 104 L.Ed.2d 268 (May 1, 1989). Ms. Hopkins was a senior manager proposed for partner in a national accounting firm in 1982. Her peer review evaluations were mixed. Some praised her for "outstanding performance," while others criticized her "macho" and "abrasive" manner. Consideration for partnership was deferred for one year although she had brought in more business to the firm than any of the 87 male partnership candidates that year. One partner told her that gender was a major reason for rejecting her. He advised her that her "professional" problems would be solved if she would "walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry." Another partner repeatedly commented that he could not consider any woman seriously as a partnership candidate because he thought that women were not even capable of functioning as senior managers. When the partners later refused to propose her again for partnership, she brought this action claiming sexual discrimination in violation of title VII. The U.S. Supreme Court granted *certiorari* to determine the allocation of the burden of proof in a case involving mixed motives.

Her employer argued that even if a plaintiff shows that her gender played a part in her employment decision, she still had the burden to show that the decision would have been different if the employer had not discriminated. Ms. Hopkins argued that an employer violates the statute whenever the employer allows a discriminatory factor to play a part in an employment decision; once the employee has met the initial burden, an employer's proof that the same decision would have been made in absence of discrimination should serve only to limit equitable relief, not to avoid liability. The plurality concluded that an employer is not liable if the employer carries the burden of proving that the same decision would have been made even if gender had not been considered.

Section 5 of the bill modifies *Hopkins* to make clear that even some discrimination is unacceptable. It also recognizes the need to ensure that persons subjected to such discrimination are not beneficiaries of inappropriate remedies. In those instances in which discrimination has been a motivating factor in an employment decision and the employer proves that the same decision would have been made in the absence of the discriminatory motive, liability exists, but the remedy is tailored to meet the circumstances. When a victim of discrimination is shown to be unqualified for a job or a promotion, remedial relief would not include employment or promotion, but the court may order declaratory relief, injunctive relief, changes in the employment decision-making process, or changes in grievance procedures to address the discriminatory conduct.

Even before the majority of the U.S. Supreme Court eroded protection for women and minorities in the workplace, title VII and § 1981 had remedial deficiencies. Title VII does not reach any person subjected to discrimination whose employer has fewer than 15 employees. Section 1981 applies regardless of the number of employees involved, but it offers no relief to men or women who are victims of discrimination other than racial or ethnic. No one, regardless of race or the number of persons in employment in his or her place of work can recover compensatory or punitive damages under federal antidiscrimination laws if he or she is racially discriminated against or sexually harassed on the job. No remedy for on-the-job discrimination is available under § 1981. Title VII limits relief to injunctions, declaratory relief and backpay. The Civil Rights Act of 1990 is designed to cure these deficiencies by eliminating anomalies and strengthening the remedial provisions.

CONCLUSION

The human dignity of every American should be respected in the workplace. No one can work productively and efficiently who is subjected to racial and ethnic slurs, arbitrarily placed in pigeon holes defined by gender, race, ethnicity, religion,

or any other characteristics that are irrelevant to job performance. Sexual harassment is not tolerable in a working environment.

American workers are entitled to the protections of the Civil Rights Act of 1990 as a national expression of justice. Even if the Senate were not moved to enact this bill as a matter of conscience, all Senators should support the bill because it is necessary to preserve the economic health of the country. America must rely on the productive capacities of all of our workers. The nation now relies on the labor of millions of women and minorities. The demographics forceably tell us that we will rely even more heavily on the work of women and minorities for the rest of this decade and well into the next century. All of our citizens should be entitled to compete for jobs, for promotions, and for the rewards from every kind of honest labor for which each is qualified. Each is entitled to compete fairly in the labor market. Enactment of the Civil Rights Act of 1990 will move the nation strongly to these goals. I earnestly ask your wholehearted supported of the bill—for the men and women who need justice in the workplace and for the nation that must depend upon their labor.

The CHAIRMAN. Secretary Marshall.

Mr. MARSHALL. Thank you, Mr. Chairman, members of the committee. I am grateful for the opportunity to comment on this important legislation.

Let me state at the outset that I strongly support the Civil Rights Act of 1990. The specifics, as they have been outlined here so ably by my colleagues, I won't spend a lot of time on, but what I would like to address myself to is mainly the economics and labor market aspects of this legislation and this important problem that the country faces.

I think that it is absolutely the case that the elimination of discrimination has become a moral and an economic necessity, because those things have come together these days, and even those people who won't accept the moral imperative had better make a virtue of necessity because we are going to be, we are and will be even more in the future, a multicultural, multiracial society.

Almost all of the growth of our workforce for the rest of this century will be women and minorities—mostly minorities. Women, white women, will be a little more than one-third of the growth of our workforce. Women and minorities together will be over 90 percent of the growth of our workforce.

I think it has become abundantly clear that the American economy is in trouble, and one of the main reasons that we are in trouble is because we are losing competitiveness across a broad range of industries, high-tech as well as smokestack, and that the major reason that we are losing that competitive position is because we do not have the efficient productive systems of many of our competitors in the country, and that relates heavily to the quality of their workforces.

Now, we are not likely to be able to develop our people, our women and minorities, as long as we permit discrimination and unless we make the most effective use of people who will be the largest, overwhelming proportion of the growth of our workforce.

Now, while other things are important to reestablish our competitive position in the world, the elimination of discrimination is an absolute necessity for that.

I think the specifics of this legislation are very important, and I support the specifics. I think my colleagues here spelled out the reasons for that very clearly.

Let me address a broader issue, Mr. Chairman, and that is the moral implications of civil rights legislation and the moral climate that tends to be created as a result of such legislation.

The reason that the passage of the Civil Rights Act was so important in 1964 was that it created a favorable moral climate. It created the sense that a majority of the people were overwhelmingly in favor of the elimination of discrimination. That had a very powerful impact on the people who were doing the discriminating, on the public at large, and especially on people who had been discriminated against.

Now, the recent reversals of that moral climate have had negative impacts on all of these. It created an unfortunate kind of feeling that somehow the government believes the problem has been solved and that discrimination is, therefore, no longer a high-priority issue in the country. And I think the passage of this legislation would reverse and restore us to this earlier time when we were making progress in eliminating discrimination.

Mr. Chairman, as you know, for the last 2½ years or so I have been heavily involved in education of minorities, with help from the ACTION Council on Minority Education, which I chair and which you served on. One of the things that became very clear to me in that work and looking at the education of minorities is what a deadly force discrimination is, even to very young children. Discrimination against the parents are visited on the children.

One of the reasons that we found that it was possible for young Asian immigrants to make more educational progress than young blacks of the same age is that those Asian immigrants didn't suffer the long history of institutionalized racism and discrimination in this country. There are other factors involved, but I concluded from the evidence that that was a very important impact on those young children because the expectation frequently was that they could not learn. They were programmed for failure at birth. And there were many other factors involved besides discrimination, but discrimination was a very important part of that.

It was also demonstrated repeatedly that effective work like that of Jim Colmer and his work in New Haven, CT, could reverse that history, but that his work, it would be greatly improved if there was this moral climate that somehow the overwhelming majority of the people wanted these young people to succeed.

I cannot overemphasize the importance, in terms of the future of our workforce, that we have quality education for minorities and that we create the sense that they in fact can succeed.

Now, I mentioned that it is an economic necessity. Let me enlarge on that argument, Mr. Chairman. I think it is pretty obvious to most people that the economic health of the country depends heavily on the quality of the workforce. And the main reason for that is very simple: That we can compete in the world either by reducing our incomes or by improving our productivity. And those are our only two options.

Since the early 1970's, we have been competing in the world by cutting our incomes and having incomes become more unequally distributed. And if we are going to reverse that, then we must have a much higher-quality workforce than we now have. Why? Well, basically it is that the only way to improve productivity is to im-

prove management systems and to have people who can develop and use the leading-edge technologies.

Now, at the top of our workforce we have people who are world-class, primarily because our postsecondary institutions are world-class and also because we attract a lot of talented immigrants. Legal immigrants to the United States have higher levels of education than native-born Americans. Illegal immigrants to the United States do not. But legal immigrants enrich our human capital pool.

Another important reason for the strength of our workforce is that many companies have world-class education and training systems. Now, one of the things that the evidence shows is that minorities and women do not have equal access to those world-class education and training systems.

Now, part of the education goes with the job. So if we are unable to get minorities and women into the jobs, they are not likely to be able to get the world-class education and training that would go with those jobs. Therefore, it seems to me to be very clear that we need to eliminate discrimination in order to be able to make it possible to develop a world-class system.

I believe this, the economic imperative, is made even more serious by the aging of the workforce and the aging of our population. Most of the people who are aging are white. The first babyboomer will become 55 in the year 2000. There were 77 million of them. They will start trying to retire in the year 2010. They will be retiring in droves or attempting to retire in droves after that.

Now, for the next 20 years, if we have a stagnant economy, pervasive discrimination against minorities and women, we will not be able to meet the retirement expectations of the babyboomers, nor will we be able to reverse the decline in the competitiveness of the American economy.

Now, the good news is that we have basically a very strong economy and, therefore, have the assets to turn it around.

Another part of the good news is the well-educated women and the babyboomers supply the human capital needed for a strong and progressive economy.

Another part of the good news is that highly motivated minorities can contribute significantly to the economic health of this country. Minorities and women and immigrants have contributed a great deal of energy and creativity and dynamism to the American economy, and they can continue to do that.

Another part of the good news, of course, is that there are tremendous advantages to being a multicultural, multiracial society, of creativity and dynamism and improvements in the quality of life and improvements in the economy because creativity will determine whether or not we are able to develop and use the leading-edge technology required to be a world-class economy.

The down side of all that, of course, is equally serious; and that is that nothing is more deadly to a society than racial and ethnic and religious conflict. And if we add to that the possibility of conflict because of age, and we have a very serious problem on our hands.

So that therefore, it seems to me to be very clear that eliminating discrimination is extremely important to the future of this country both as a moral imperative in order to maintain social har-

mony. And let me also emphasize as an economist, that unity and a sense of community is terribly important to economic performance, and that if we are divided in this country, we are going to have a hard time having a strong economy. And therefore, to be able to build that sense of unity is extremely important.

So I think that this legislation would convey a very important moral message, but it would also be very important for the economy for us to do that.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Marshall follows:]

PREPARED STATEMENT OF RAY MARSHALL

Mr. Chairman, members of the Committee on Labor and Human Resources.

I am pleased to have this opportunity to support the Civil Rights Act of 1990. It also is reassuring to see that this important legislation has broad bipartisan support. The nation's political, social, and economic health clearly requires that we build as much national unity as possible for the elimination of discrimination against people for reasons unrelated to merit and productivity. The Civil Rights Act of 1990 seems to me to be a balanced attempt to continue the progress we have made in combating discrimination by clarifying some uncertainties, closing some important coverage gaps, and strengthening enforcement. It seems to me to be particularly important to restore the burden of proof to employers in disparate impact cases. It is unreasonable to expect the victims to discrimination to carry this burden. The evidence also is very clear that while voluntary compliance is a major effect of civil rights legislation, voluntary compliance is strengthened by strong enforcement procedures and penalties for those who violate the law. If some people believe they can gain advantage or avoid changing their practices because of weak enforcement, not only do victims suffer, but respect for law is weakened.

There is a more general, but very important, reason why this legislation is needed. There is a tendency in some quarters to defend the weakening of civil rights protections that have occurred in recent years on narrow legal grounds. Whatever the merits of such arguments, they miss the main point that many of the victims of discrimination feel that the clock is being turned back, and that the nation's policy makers really are not serious about eradicating discrimination. This perception breeds a hopelessness and despair that is very damaging to both the victims of discrimination and to our country,. Such perceptions are particularly damaging to people who have been the victims of long, deeply entrenched, well documented institutionalized discrimination. There is evidence, for example, that many minority children believe that they really do not have a chance to make it in this country because the cards are stacked against them. These attitudes lend to self-fulfilling prophecies that young minority children will not make it. This at least partly explains why it is that young Asian children without a long history of discrimination in the United States are able to work hard and excel while other minorities have more difficulty. We know that expectations of what children can do have important implications for what they will do. Although poverty and other factors also are involved in the economic and social disadvantage of minorities, there can be no doubt that discrimination is an important and pervasive part of this constellation of factors My main point is that the passage of the Civil Rights Act of 1990 by bipartisan support would send a strong positive signal to people who have been the victims of institutionalized discrimination. And the consequences of this message would be positive for the country as well as for the victims of discrimination.

Mr. Chairman, I have been asked to address the economic and labor market implications of the Civil Rights Act of 1990. I believe this legislation would strengthen economic and labor market efficiency for the following reasons:

(1) Discrimination creates inefficiencies by impeding the full development of human resources. Some critics argue that antidiscrimination laws interfere with market efficiency, but this is clearly wrong. By removing obstacles to the operations of internal and external labor markets, antidiscrimination laws improve both the development of human resource and labor market efficiency. In other words, antidiscrimination measures that might distort "perfect" markets improve the imperfect ones we actully have.

(2) The elimination of discrimination becomes a much more important requirement for economic efficiency in a highly competitive, knowledge-intensive global economy. This is so for the following reasons:

(a) National economic health depends heavily on having higher order thinking skills ore broadly distributed in the work force than was the case in the more national goods producing economy of the 1950s and the 1960s. This is so because relatively uneducated, unskilled workers are less likely to be able to earn a living wage in this more knowledge-intensive competitive environment. It will be very difficult, in other words, for American workers to earn wages several times higher than those of foreign workers whose work force skills are at least equal to those of American workers.

(b) The competitiveness of the American economy and the incomes of Americans therefore depend heavily on the ability to improve productivity, quality, and flexibility through the development and use of leading edge technology. In other words, we must have workers who have such skills as the ability to analyze the data made available by information technology, communicate with precision, learn, deal with ambiguity, and get along with other people. People without these skills will have a harder time making a living and are therefore more likely to be forced to depend on public assistance.

At the top of our work force we have people with these skills, mainly because of the quality of our universities, some world class corporate learning systems, and highly talented immigrants. However, there is strong evidence that minorities and women are underrepresented in all of these learning systems.[1]

Our labor force problems are caused mainly by inferior schools (especially those attended by disadvantaged minorities), poverty, poor school-to-work transition systems, and discrimination. The elimination of discrimination is therefore a necessary, but not sufficient, condition for developing a high quality work force.

(c) Because of demographic and labor market developments, those who have been the victims of discrimination in learning systems and on the job will be the fastest growing components of our work force. Between now and the year 2000, white males will constitute less than 10 percent of our work force growth. We are, moreover, becoming increasingly a minority country. Whites probably will peak in absolute numbers early in the 21st century and become a minority of the U.S. population by 1080.

We will therefore have great difficulty unless we remove the barriers to the efficient utilization of women and minorities.

There also is a certain urgency about this matter because of the aging of our white population, especially the large baby boom generation, the first cohort of which becomes 55 in the year 2000. If we do not have a high quality work force and more productive economy by 2010, the resource drag from an aging population could greatly weaken our economy. We could also add conflict between younger and older workers to the racial and ethnic conflict that saps our strength and diminishes the quality of our lives.

The good news is that the United States has some very important strengths. Despite our problems, ours is still a very strong economy. There is, moreover, much latent strength and creativity in our rapidly growing minority population and in better educated women workers. Clearly, however, we will not be able to fully harness these energies, talents, and creativities unless we remove discriminatory barriers and promote fuller development of minorities. There are very important advantages to being a multi-cultural, multi-racial society. But cultural and racial conflict can be very deadly to any society. That is why it is so important to build broad support for measures to eliminate all facets of discrimination. As noted at the outset, I believe the passage of the Civil Rights Act of 1990 would further this objective.

Mr. Chairman, that concludes my formal remarks. I would be glad to respond to any questions you or other members of the committee might have.

The CHAIRMAN. Thank you very much to all the panelists. It has been an excellent presentation in terms of both the legislation, the implications of the overturning of many of these prior decisions, and also an excellent summary of what has been included in the legislation, an accurate presentation.

I would like to see if we could limit ourselves to 10 minutes. We are going to, as Senator Hatch has appropriately mentioned, try to

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[1] Lee Lillard and Hong Ton, *Private Sector Training: Who Gets it and What are its Effects?* (Santa Monica, CA: The Rand Corporation, 1986); Quality Education for Minorities Project, *Education That Works: An Action Plan for the Education of Minorities* (Cambridge, MA: QEM Project, 1990).

divide also in terms of times of those who support the legislation and those that have reservations about it. So we will try to give a little flexibility to the Chair so that we have at least a balanced record on this.

But I would like to ask at least initially if we could limit ourselves.

Senator METZENBAUM. Mr. Chairman, may I respectfully make a suggestion?

The CHAIRMAN. Please.

Senator METZENBAUM. I look at the clock and I see the list of distinguished witnesses we have. I would be willing to limit myself to 5 minutes. I wonder whether other members might feel that they could do the same so that we will not all be walking out on some of these distinguished witnesses who have yet to be heard?

The CHAIRMAN. Excellent. We will make it 6 minutes, Howard. [Laughter.]

It is a regrettable situation. We have the whole morning, two excellent panels and very distinguished individuals who have had an important role in the making of the laws. So it is regrettable that we can't spend all the time, because it would be valuable.

We will try it with what I described, and move the hearing.

First, Secretary Coleman, it has been suggested that the bill would make it unlawful for the employer to have a racial imbalance in its workforce. Would you tell us why that suggestion is wrong?

Mr. COLEMAN. Well, that is wrong because the statute says that a complaining party has to demonstrate that the employment practice results in a disparate impact on the basis of race, color, religion, or sex, and the word "demonstrate," which is in section 4, is defined in section 3 which says the term "demonstrates" means meets the burden of production and persuasion."

In other words, he has to prove that, based upon the evidence, that this particular policy had an adverse impact on the makeup of the workforce, and it is only then that the plaintiff is able to get to the jury. And it doesn't mean that you walk into a community and you see a proportion of 80 percent black, 20 percent white, that that is the way the workforce has to be or else everybody is illegal and should be put in jail.

If that were so, the White House would be locked up tomorrow. [Laughter.]

Certainly with this community being 80 percent black and 20 percent white, that is not the way they select personnel in the White House, on the other hand. And that's true. And I tried to demonstrate by the cases that have been brought, there are a lot of these cases where you cannot prove, even though statistically you show the imbalance, you cannot prove that that is the result of the policy adopted by the employer.

The CHAIRMAN. Well, now let me say I think a key element is the qualified workforce. That is what we are really talking about.

Mr. COLEMAN. Right.

The CHAIRMAN. So, if we are talking about scientists at the Livermore Laboratories and you have 1 percent black in the workforce out there, and the case may be brought, but they have certain requirements in terms of certain degrees and certain training. And

you might be able to demonstrate that among the blacks there is only 1 percent nationwide that meet these particular requirements.

We are not saying that because the workforce is 25 or 30 percent black, that Lawrence Livermore has to have 30 percent, do we? Are we? We are talking about the qualified workforce.

Mr. COLEMAN. The statute doesn't. The statute doesn't say that. And once again, all you are doing in this statute, you are not in any way saying that you are changing one iota the burden of proof that the plaintiff has to have to stay in Court. All you're saying is that once he discharges that burden of proof and then the employer comes in to give a defense, that the employer has the burden of proving that that is the defense.

The CHAIRMAN. Well, some say that that makes the standard of proof impossibly high, so that employers would be required to adopt quotas. That is a criticism of that.

Mr. COLEMAN. That is just not true. That hasn't happened. *Griggs* has existed for 18 years, and I don't think there are any employers that are adopting quotas. I mean we have lived under *Griggs* for 18 years, there have been all these cases, and nobody has gone out and adopted quotas.

The CHAIRMAN. So, based on your understanding of the law prior to *Wards Cove*, it's fair to say the Civil Rights Act of 1990 would simply restore the law to what it was at the time?

Mr. COLEMAN. That's right. Yes.

The CHAIRMAN. And would you explain briefly the bill's proposed method for dealing with the multifactor selection practices, the groups of practices, why those provisions will not lead to quotas?

Mr. COLEMAN. Well, the problem there is that if the employer gives five reasons and you can't determine which one is it but you then begin to eliminate those that you know would not result in the disparate impact and you come down to the fact that there are two left that you can't explain there is, then the statute says that you, under those circumstances, can use those two.

And the best proof that, if you adopt the provision in the statute, that you are not doing anything which is wrong is that the Justice Department, under Charlie Fried, took that position.

I mean, I have quoted the language from a brief where the Justice Department has said, prior to *Wards Cove*, that if there are five reasons and if there is the impact, that the plaintiff then doesn't have to identify which one of the five it is. And that makes it almost impossible to prove, and therefore that is not making the change.

The CHAIRMAN. Secretary Marshall, there are some that say that we don't really need this legislation now because, as you described the workforce, there is going to be such a demand by employers for women and minorities that we don't really need tough laws. I would like you just to address that issue.

And then second, you were Secretary of Labor during an important period when this legislation on the *Griggs* case was being implemented. Could you please tell us whether that decision, really as an authority on this, required quotas?

If you could deal with both of those.

Mr. MARSHALL. Well, I think you are right, there will be a strong incentive for employers who want to be world-class and want to be competitive to recruit, hire, and train minorities and women.

The reason that this legislation is important is you can't expect employers necessarily to do what is in even their own interest to do. And I think one of the main reasons for us having legislation is to be able to remove a lot of social barriers and to create a climate to make it possible for employers to do what is in their own interest to do.

The individual employers are not always able to do what is in their collective interests to do, and that is, I think, the reason to get this legislation.

Second, it makes the assumption that employers understand all these things. And one of the reasons that we are in trouble in the country is a lot of employers don't understand what is needed to make the American system a competitive system.

Fortunately, many do, and they are exercising the leadership, just on equal opportunity, those employers who have taken the lead on this have been the best-managed firms, just like they are the same people who took the lead on occupational safety and health and many other issues and therefore are world-class. Unfortunately, not enough of our employers are in that category. That seems to me, therefore, to be the reason that this kind of legislation is necessary.

In economic terms, Mr. Chairman, the way the debate has been, some of us believe that interventions which would distort a perfect market and a perfect management situation will improve the ones we have got because they are not perfect, and will cause them to operate in a much better fashion.

With respect to whether or not *Griggs* caused quotas, I don't think there is any evidence for that. I think that it seems to be me to be perfectly unreasonable to expect plaintiffs to have the burden of proof in these cases, because what that means is that they have the obligation then to disentangle the employer's complicated employment procedures.

Now, how can plaintiffs know that as well as the employer can? It seems to me to be perfectly reasonable that once you have made the case that you have got a disparate impact, that the burden of proof ought to shift to the company. The company is in a much better position. The employer is in a better position to explain those practices and to show whether they are justified or not than plaintiffs could be. So, not only do I think it would not create a quota, but I also believe that it is reasonable to have the *Griggs* doctrine.

The CHAIRMAN. Thank you very much.

I think we will move ahead, Senator Hatch.

Senator HATCH. All right. I can't do this in 5 minutes, but I will do my best to move along.

Senator METZENBAUM. It's 6.

Senator HATCH. I have 6 minutes. [Laughter.]

I have enormous regard for each of you. Each of you has excelled in your respective fields.

Ray, it's nice to have you back before the committee once again. You've come a number of times. But it's good to see you.

Judge Hufstedler, I respect you.

And, my friend Bill Coleman, I have just enormous regard for you.

I might mention with regard to the *Martin* v. *Wilks* case, which you described as a promotion case, actually it involved a current creed affecting complete city and county hiring practices, including promotions, not just the promotion of this one individual.

Ms. HUFSTEDLER. That is correct.

Senator HATCH. Let me just say this. As I recall that case and that decree, it affected all third parties whether they were ever notified or had any idea of what was happening or not.

Now, let me just go a little further. Moreover, this bill does not provide an opportunity to be heard and then provide finality. A member of the plaintiff class action can sue an employer even if that employer had entered into a consent decree with the class. He or she can seek even further relief.

Now, the white firefighters in the Birmingham *Martin* v. *Wilks* case, as a practical matter, under this case, could not have brought a subsequent lawsuit challenging the decree claiming that it harmed them. That would be a double standard. I think that is important to point out.

With regard to what you said, Mr. Marshall, I agree with your concern about a multiracial society and providing for all and making sure that our employers understand that we have to get rid of all discrimination if we want to be a world-class Nation. I don't think there is any question about it.

And I also agree with both of your statistics with regard to the workforce in your case, to women in your case, Judge Hufstedler. That is one reason why over these years I have worked very hard to try to provide for, in the case of women, all kinds of legislation that will help them up this economic ladder, from child care to women in science to latchkey children, rape crisis centers, Americans With Disabilities Act. You name it, we have basically been there.

And you have cited some very important statistics as we go into the next century, and you have also. And I think that has been very helpful here.

With regard to my friend Bill Coleman, why don't I end at this point because of the time constraints, and then what I would like to do is to come back and discuss the law a little bit with you. And that will take longer than 6 minutes, so I will just wait until my second try, if that's all right.

Senator METZENBAUM. First, Mr. Chairman, I want to congratulate you on having these three witnesses. I do not know whether I have ever heard, since I have been in the Senate, three more able witnesses express themselves so succinctly and cogently on a subject. They certainly have magnificent legal as well as professional backgrounds. And I think they are just superb witnesses.

Mr. Coleman, in addition to your distinguished legal and government careers, you have been a corporate director and advisor to leading employers in this country.

In the last two decades, what has been your experience with employers dealing with the law as it developed under *Griggs* v. *Duke Power*?

Mr. COLEMAN. My experience has been certainly companies like IBM, Ford Motor Company, Chase Manhattan Bank and others that I have been involved, been on their boards, or represented them, they have accepted *Griggs*. They think it makes sense, and I think they are happy that they had the specific rules and they knew how to handle them.

There are no quotas in any of those places. They have managed it quite well. And in the board rooms I have never heard any criticism against *Griggs*. And I am pretty sure that *Wards Cove* will open up completely new problems, and I think it would be counterproductive to what I think most of the companies I have been involved in would like to see happen.

Senator METZENBAUM. Good.

How dramatic a change was the *Wards Cove* decision, and what do you see its impact being on women and minorities?

Mr. COLEMAN. Well, I think it will make it almost impossible to prove a case under the statute, because it is the employer who knows and ought to be the one that has the duty to explain why, when you look at the plant or you look at the factory and you look at people that applied for jobs, who got promoted and everything, that you had a disparate workforce. Once you have been able to prove that, I think it is the employer that has to do it.

The best case is that there were cases that were in the Courts that the black plaintiffs were winning and women were winning. And once *Wards Cove* came down, I think, according to my count, at least, 305 cases have been reversed, which before, under the law as existed before, the women and the blacks were winning.

Senator METZENBAUM. Thank you.

Judge Hufstedler, the Bush administration has indicated it would support legislation limited to overturning the *Patterson* and *Lorance* decisions. Do you think that approach adequately addresses the problems raised by last year's U.S. Supreme Court rulings?

Ms. HUFSTEDLER. Most definitely, no. It does not overturn the other decisions, which of course have been an enormous step backwards in the enforcement of civil rights legislation.

And as my colleagues have pointed out, we should have justice in the workplace as a matter of conscience. But what is not understood—and apparently, not in the White House either—is that we have to do it even if we were motivated by cupidity.

Senator METZENBAUM. Thank you.

What type of signals do you think these decisions send to the business community? What is the message for women and minorities as well?

Ms. HUFSTEDLER. The message is very, very clear: "Don't worry about the law. Don't worry about it, because it doesn't make that much difference. Just among us boys, we just wink at that."

That is what has happened. That is what is wrong with not having a moral imperative, which this Senate began in the strongest possible way in 1965.

It's what happened when the country began to realize that we could not live in apartheid. We decided we couldn't live in apartheid then, but many, many Americans live in de facto apartheid in the workplace, even today.

Senator METZENBAUM. Thank you.

Mr. Marshall, as you may know, we have been making an effort to improve opportunities for women seeking jobs in traditionally male occupations like construction and aerospace and have actually enacted some legislation along that line.

If we do nothing to change the U.S. Supreme Court's recent decisions, do you think that the changing demographics in the workforce alone will lead employers to hire women for these so-called nontraditional jobs?

Mr. MARSHALL. It might lead some of them to hire them, Senator, but it would also lead them to continue discriminating against them. One of the main reasons that a lot of companies have been hiring women is because it is, from their perspective, a good deal because they can get better-educated people, more highly skilled people, and pay them less.

Now, I can see why employers would do that, but I can't see why the country would tolerate it, partly because it dampens the development of our human resources. It's very hard for women to overcome the sense that it wouldn't do a lot of good to try to train for a lot of these occupations because they couldn't get them, and that even if they did get them, they would suffer discrimination because of pay in those jobs.

There is an important difference between hiring and discriminating against, and I think we ought to eliminate both the discrimination in hiring and conditions of employment against women. I think that is the reason this kind of legislation is important, because you can't say, "Well, it's all right that you can't discriminate against people in hiring, but whatever you do to them on the job is all right."

I do not believe that most people, most males, in this country understand the seriousness of sexual harassment on the job and how important, how deadly that is to women workers on the job. And therefore, it seems to me that we need to understand that because whether we like it or not—and I happen to like the multicultural, multiracial, diverse society, and I think that there are tremendous benefits to the society from having more women in the workplace and increasing our economic potential.

This is particularly true these days when young women entering the workforce are better educated than young men entering the workforce and, therefore, will enrich our human capital pool. But they will not be able to enrich it fully unless we make opportunities available to them across the board both in the kinds of jobs they can hold and in the conditions of employment.

Mr. COLEMAN. Mr. Senator, could I add to that? I am in an organization of a big law firm, and we are faced with this problem with women coming into the workforce, and we certainly hire those that are talented, but once they get in there is a question of promotion and becoming partner.

That decision is, in part, objective: You have to finish law school; there have to be in certain places. But then it becomes fairly subjective: Does she attract clients; can she do this; can she do that?

I think that the *Watson* case, which makes it clear that even when you're dealing with subjective factors, that at the end you still have this problem of disparate impact, is very important that because we're still part of the old-boys club and we may give

reason. And just like in the *Price Waterhouse* case, they said that the woman shouldn't become a partner, in part, because she didn't attract a lot of clients.

Well, I've got a lot of partners that never bring in a client. [Laughter.]

But, therefore you need this, and therefore you need the law to say that when you get finished with all these fancy decisions and weighing, you've still got to look at your workforce. And based upon the number coming in, if all the women have Law Review from Stanford and everything but yet as they come near to the top, a partnership, that you tend to knock them out more than you're knocking the males out, that is something that you have to have the discipline to take a look at.

And if you have the rule that you have in the statute that if there is a disparate impact, that that should cause you to take a look at it. And then you have to say, "Why am I making these changes? Why am I doing this?" And you have the burden to come up with a reason which is valid and is not in any way based upon sex.

I guess I shouldn't say this because I am one of those partners in a major law firm and we have to face this problem. But I think it's very important. It's a discipline. I think the firms ought to have it, and if you don't have it, I don't think the women will be able to break through that glass, which is happening, because as they come to the top you begin to have all these rules.

And really, if you would sit back sometime and look even at people as to who you will select for President, and when it comes to a woman, you have a lot of crazy things. You look at some of the men that run, they've got the same characteristics. What makes the difference?

I really think it's very important to have this discipline. And I hope that you will keep that in mind that if you are really going to open up the workforce, that it is very important that the employer has to say, "If there is a disparate impact in whatever my rules are, I better take another look at it, and unless I can come up with a business-necessity rule that demonstrates that, I ought to actively try to make a change."

Senator METZENBAUM. We may add an amendment to the pending bill that provides that any member of a law firm, whether minority or not, if he fails to bring in a sufficient number of clients may be discriminated against. [Laughter.]

Mr. COLEMAN. He would become a partner. [Laughter.]

The CHAIRMAN. Senator Kassebaum.

Senator KASSEBAUM. Mr. Chairman, it's unfortunate that the Senate doesn't reflect this diverse, multicultural society that we are in the United States. [Laughter.]

I would just like to comment first that I think we all would agree on the importance of eliminating discrimination in this country. I think all three of you have been engaged in that process for many years, and I don't think that there is any question of the moral and economic necessity of this, as we all have believed, certainly in recent years. We came late to understanding the importance of this to our Nation.

But I suppose the question before us in the broadest sense is how far we can expect the law to do this. And clearly, there are times that we have to write laws to prohibit certain actions. That we have done and we are continuing to try to do.

But unfortunately, we cannot write laws to change attitudes. Senator Mikulski and I are at work on trying to change some attitudes here in the Senate, but it does take some time.

I am not a lawyer. I am trying very hard to understand some of the intricacies of the law in this instance, and I would like to just ask one question of the three of you who have been very involved in this legislation over a period of time.

How effective do you think that title VII, for instance, has been prior to the recent U.S. Supreme Court decisions, most of them having come just in the last year, that have affected this?

I think, Judge Hufstedler, you made the comment that after title VII there were significant changes.

Ms. HUFSTEDLER. Yes. There were significant changes. Unfortunately, from the very threshold of the enactment of title VII, the failure to have any kind of damage remedy which was equivalent to that in 1981 was a severe handicap. And because there were other limitations imposed by these same decisions we are criticizing on trying to obtain attorneys fees to get the representation, that was also a problem.

And when we say, Senator Kassebaum, we can't change attitudes, of course we do. We do. If one looks at the history of the Nation and looks particularly at the American South since *Brown* v. *Board of Education* in 1954, you would see an enormous change in attitude.

All is not perfect, but after all, the other side of the love-hate relationship of blacks and whites in the South was not hate, but love. And a good many, many changes have gone through the South, which never would have occurred if the law had not been changed.

Senator KASSEBAUM. Well, I didn't mean to imply the law doesn't play an important role. But I am not sure you can legislate a change in attitude. I think those attitudes come from an environment that by law we have changed, whether it's in education or whether it's in the workplace.

Ms. HUFSTEDLER. Well, you see, I agree with you, in part. What I think is critically important, and each of my colleagues has mentioned it, it is the use of the great powers of the Senate and of the presidency of the United States to say that it is a moral imperative. It is the bully pulpit of morality that makes a huge difference in how people go along.

When we blink at it, when we say, "Oh, well, never mind," no matter how subtle that is, it seeps through the whole society, saying, "Don't worry about it."

Mr. MARSHALL. Senator, I have devoted many years to trying to answer the question you raise and have written several books on it. I don't think I would necessarily know. But I have given it a lot of thought. And I have come to the following conclusions, and I have studied specifically the impact of title VII on employment in the country, but in the South and in particular industries.

I come to the following conclusions: First, it has a tremendous impact, but the impact is not just in the litigation and enforce-

ment. The first very important impact of legislation is to set this moral climate about what the country stands for and what is accepted behavior. And therefore, a lot of people will bring their lives into conformity with what they believe is accepted behavior and right. It's got the moral power. So you get a rush, when a legislation is first passed, for people to change their ways because of that.

The second reason they change, you see, discrimination is partly because of ideas of status, that you don't want "inferior" people to get involved in your workplace or your club or whatever, people that you consider to be inferior. And that is one aspect of it. That is the way you can explain a lot of behavior. That is the reason you can say they will take them into the law firm but not make them a partner, or you'll take them into an organization but you will create what I call the "new traditional jobs for women."

When I go into companies, I can tell you, from studying this, they always bring those in, and I can tell you what they do, because they've got a new level of segregation within the workplace.

Now, so it's that, it's status. But it's also economic advantage you think you gain from the action. And therefore, one of the reasons that a lot of, say, southern employers before the Civil Rights Act of 1964 would not hire blacks even if they knew that it was in their economic interest, their narrow economic interest to do it, is because they were afraid of social pressure. They were afraid of reaction from white workers and customers.

Now, what the law did was to give those employers cover to do what was in their economic interest to do, and if you look at the textile industry, which was originally created to be a "white man's industry," and very few blacks were employed in it, suddenly you got a large increase in black employment in that industry.

Now, the reason I believe the legislation and litigation are important is because while probably the greatest impact comes from this kind of moral impact is the moral cover that people get to do what they ought to be doing anyway and you get voluntarism as a way to solve a lot of problems, my experience with that—and my experience is being responsible for the enforcement of the OFCCP, the government contracting antidiscrimination provisions in contracts—is that you get a lot more moral and voluntary action if there is enforcement in the background.

I guess it's like Dr. Johnson says, "There's nothing like the threat of a hanging in a fortnight to concentrate your thoughts wondrously." [Laughter.]

Senator HATCH. I think that is a good analogy.

Mr. MARSHALL. It is. But if people believe you're not going to enforce the law, then it becomes a joke. It does not have that moral imperative. And particularly, the victims of discrimination say, "This is dishonest. This is hypocritical. They pass a law, but they won't enforce it. They're not really serious about it."

And I think the way we demonstrate that we're serious about this problem is to have strong enforcement and to encourage voluntary compliance. I think that is the best, and I think for companies to reexamine their own affairs and do the right thing is better.

Anyway, those are the main conclusions.

Now, with respect to attitudes, let me make a point about that. Discrimination is motivated by attitudes, but discrimination and

attitudes are not synonymous. There are some people who do some wonderful things who are very biased because of economic necessity, and there are people who discriminate who say they've got wonderful attitudes, the most egalitarian attitudes.

And therefore, I think the line of causation goes: You change their behavior, and you will change their attitudes. Psychologists call that cognitive dissonance. I saw it happen before I ever knew what the word meant. And that is that you rationalize what you are forced to do, and you then come to understand.

Jackie Robinson put it pretty well when he said, "I don't care what you think about me. Just let me play baseball." And once he played baseball, nobody could come along and be taught, as I was, growing up in the South, that blacks can't play major league baseball. He put an end to that idea forever once you change the reality, the action.

So, your attitudes change not because somebody educated us, but because reality changed. And I think that is what we have to do with discrimination against women. The assumption is that women can't do certain things, just as the assumption was blacks couldn't do certain things. And the consequence of that is that we created negative self-fulfilling prophecy. Once we change the behavior, then we will change people's attitude about it.

Mr. COLEMAN. Senator.

Senator KASSEBAUM. Yes, Mr. Coleman.

Mr. COLEMAN. To get your vote to overrule *Wards Cove*, I don't have to demonstrate to you that you've got to make sure that will change attitudes. What I am saying is that the law ought to be what it was before under *Griggs*.

But having said that, I slightly have to disagree with you that the law doesn't change attitudes.

Senator KASSEBAUM. Well, I have just merely raised the philosophical question. [Laughter.]

This has gotten beyond my question.

Mr. COLEMAN. Well, just think about some of my broker clients and everything, those statutes that you pass saying you can't have insider trading and RICO and everything, I assure you that changes the attitudes fast. [Laughter.]

To look at my own experience, when I went to the Harvard Law School, they didn't take women, 1941. When I finished the Harvard Law School and joined a law firm, if you hired a woman, you hired her only because she may do some adoption work or she may do estate work. That was thought to be it.

As we got more mature and we realized and the statutes were around, that you began to hire them, they could go to the Harvard Law School, they could go to these other law schools, they tended to do as well, if not better, than the men, and you began to hire them. You now have them moving into these major law firms and having very important positions.

That is a change of attitude. You can't tell me that because the President of the United States finally decided to appoint Mrs. Justice O'Connor to the Court that that hasn't changed the attitude, the way a lot of young women feel about themselves. And it certainly has changed the attitude those other eight men up there feel

toward the ability of women. I think sometimes she's wrong. [Laughter.]

But the ability of women to have views, to change their minds. I think it does change attitude, and I think it's very important. I think that all of us males feel that we are better off as a result of what happened, although we must confess it's sometimes difficult for us to make the adjustment.

Senator KASSEBAUM. Mr. Chairman, before my view is misrepresented—— [Laughter.]

I can't argue with much of what you have said. I was only making the point or questioning how much further can one go. And all three of you, I know, believe that title VII would be strengthened by going further with punitive damages and jury trials, which basically the legislation under debate would do.

Senator HATCH. Which is far beyond current law.

Senator KASSEBAUM. The remedies would be extended.

Mr. COLEMAN. No, that is only when there is an intentional violation. You've got to make a distinction. I just think Charlie Fried kind of misread the statute. It's only when you're talking about intentional discrimination and you say that there should be punitive damage, then say that the defendant can have the right to jury. But you don't say in the disparate impact case, as I understand the statute, that there should be.

Ms. HUFSTEDLER. And we have to be reminded of course, Senator Kassebaum, that 1981 has for decades given a right for compensatory and punitive damages for intentional misconduct. What this does is simply create the mirror image with respect to women and ethnic minorities who are otherwise not covered by section 1981.

Senator KASSEBAUM. I realize you were making that argument. You were extending to title VII what exists under 1981.

Senator HATCH. And title VII has never given that right, even for intentional discrimination. Now you are going to do that. So it isn't preexisting.

Mr. COLEMAN. For intentional.

Ms. HUFSTEDLER. Intentional discrimination.

Senator HATCH. For either.

Mr. COLEMAN. No. Oh, no.

Ms. HUFSTEDLER. No, no.

Mr. COLEMAN. With all due respect, you misread your own bill. That is not so.

Senator HATCH. This isn't my bill, this is Senator Kennedy's bill. [Laughter.]

And I haven't misread it.

The CHAIRMAN. I might mention that Clarence Thomas indicated he supported that concept both in terms of his writings and lectures and also in his confirmation hearings before the Judiciary Committee.

Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

I can't recall when we have had a panel with as distinguished record of public service as the three of you, and I am very grateful for your being here.

Secretary Marshall, you divided this into the moral necessity and the economic necessity. I might just take a moment here.

It is an irony that through Eastern Europe and in South Africa today, the door of freedom, justice, and opportunity is opening, and in the United States of America, ironically, it is closing. That presents a real moral problem for us that I hope this legislation can correct.

When I took 4th grade geography, I thought that the reason we had a higher standard of living in the United States was that we were blessed with all these natural resources in the country. And there is no question it has been of help to us. But all of a sudden we are finding that the countries that are moving rapidly economically are countries with names like Japan and South Korea, where they have almost no natural resources but where they are taking advantage of their human resource. And that is why your point is extremely important here.

The *Wards Cove* decision, where there was flagrant segregation in housing, in eating, and, it is very clear, at least to me, in employment, is ultimately just a devastating opinion.

A college student wrote the cannery about getting a job with menial labor there and the response to the college student was, "Our cannery labor—that is, the menial jobs—is either Eskimo or Filipino, and we do not have the facilities to mix others with these groups."

It was just blatant discrimination. And as I recall the *Griggs* case it was, and maybe any one of the three of you can correct me, it was Justice Burger who rendered the decision.

Ms. HUFSTEDLER. Correct.

Mr. MARSHALL. Unanimous.

Ms. HUFSTEDLER. Unanimous.

Mr. MARSHALL. Unanimous decision.

Senator SIMON. OK. And Justice Burger and the Court, composed of people who were designated, rightly or wrongly, liberals and conservatives, unanimously provided that opinion.

Secretary Coleman, you said, and I didn't realize this, that there are 305 cases now that have been affected by the *Wards Cove* decision, the Alaska cannery decision.

Mr. COLEMAN. Yes.

Senator SIMON. What has been the impact of those cases?

Mr. COLEMAN. Well, just to give it to you, the total cases overruled by *Wards Cove*, that based upon the part of the decision which says to shift the burden of proof, it stays on plaintiff even after the plaintiff has shown the disparate impact and before, under *Griggs*, it's the defendant that has to give the business-necessity reason. There are 267 cases that have been overruled as a result of *Wards Cove*.

With respect to the standard of business necessity; namely that the defense has to be one of business necessity rather than the vague language in *Wards Cove* where it could be anything, that you just really didn't like his mother, almost—there are 47 cases.

And then the cases dealing with the group, the multigroup as against the one reason, six cases. For a total of 320 cases.

Senator SIMON. And if I may ask the two of you to put on your former hats as Secretaries of Labor and Education, with this kind of shifting of the burden, what does that mean to "John Smith" or

"Jane Jones," Secretary Marshall, in terms of an ability to earn a decent living?

Mr. MARSHALL. I think it has a devastating effect on also whether or not you think you can take action to eliminate discrimination against you in these particular cases, because that seems to me to be an ominous burden of proof that you have shifted to the victims of discrimination.

Not to permit the demonstration of disparate impact to start with and then to say that you've got to disentangle an employer's complicated employment system and practices, which the assumption is the employer has to know a lot more about that than workers do—you see, I am not a lawyer, so I think that some of my best friends are lawyers, so they've got a lot against them, but I think the really important question here goes beyond that.

I think the substance is important, but I think what it does beyond that is to say, "Well, what they're really doing is trying to stack the cards against us. They really don't want us to have an equal chance here. They're going to let the employers decide how this comes out, any way it goes." And I think you breed that kind of attitude when you erect barriers like this, your ability to get justice in these cases.

Ms. HUFSTEDLER. Senator Simon, what do these cases teach about what we really think about women, about those Eskimos in Alaska in their segregated workplaces? What does it teach women? What does it teach girls?

It teaches them that what we're dealing with is simply platitudes without any intention at all to make it real. And how much does a young girl value herself if she really knows that just because there has never been a woman in a fire department in the whole history of the city, can she aspire to be a firefighter? Her brother can, at least if he is a good weightlifter. What does it teach us about what the attitudes are?

Doesn't that teach girls, "Let me tell you, girls, I think you would be very pretty at a cotillion, but you aren't worth a damn in the workplace"?

Senator SIMON. I thank all three of you.

The CHAIRMAN. I withhold the rest of my questions since Senator Hatch wanted some additional time, and then we will move to the second panel.

Senator HATCH. Well, thank you, Senator Kennedy.

Let me just make a few points. I have to say I differ with both Judge Hufstedler and my friend Bill Coleman—Secretary Coleman—on the interpretation that *Griggs* was overruled by the *Wards Cove* case. I don't think it was overruled at all.

As matter of fact, the disparate impact test was held inviolate in *Wards Cove* v. *Atonio*. And I might add, the U.S. Supreme Court has continued to hold it inviolate. And as a matter of fact, in *Watson* v. *Fort Worth Bank and Trust*, the Court extended the theory of the disparate impact to subjective employer selection practices and not just to objective practices, such as tests.

So the Court, if anything, through the series of recent cases has beefed up the right to use the disparate impact test, and it was not overruled by *Atonio*. Some have claimed that the term "business

necessity," as used in *Griggs*, means literally that the practice must be essential to business. That's what this bill says.

This bill says that the term "required by business necessity" means essential to effective job performance. What happens is they show a disparate impact through statistics and then they accuse the employer of all of his employment practices in a blanket statement, which has never been done before, not prior to *Atonio*, until this statute, and then he has got to disprove every one of those aspects to even get out of the problem.

Now, some have claimed that the term business necessity, as used in *Griggs*, means literally that the practice must be essential to business, as this definition is written in this statute that the proponents would like to pass now.

That was never the case. Indeed, *Griggs* itself does not use S. 2104's "essential to effective job performance" standard, and suggests that business necessity is in fact the reasonable standard. *Wards Cove* v. *Atonio* cites it as, "the touchstone of business necessity," and says, in quote, "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." That is *Griggs*.

More than that, Congress has placed on the employer the burden of showing that "any given requirement must have a manifest relationship to the employment in question."

Now, this "job-relatedness test" or "manifest relationship test" is a far cry from requiring that the employment practice be essential. And it is perfectly captured by Justice White in the *Atonio* or the *Wards Cove* v. *Atonio* case.

But the U.S. Supreme Court has carefully rejected the extreme and totally unrealistic formulation of S. 2104 that it means essential to job performance in the *Albemarle Paper Company* v. *Moody* case, a 1975 case. In that case, the Court of Appeals for the Fourth Circuit argued for this standard, and the U.S. Supreme Court ruled it out. The U.S. Supreme Court described the employer's showing as one of "job-relatedness." It did not use the Fourth Circuit's formulation, which this bill does.

This has been law for years. This is not some new nuance to the law. The Court knew it was delineating this standard, and its choice of the term "job-related" is telling.

The Court also used the *Griggs* language in that case, that the employer practice must have "a manifest relationship to the employment in question. If an employer does then meet the burden of proving that his tests are 'job-related,' it remains open to the complainant to show that other tests or selection devices without a similarly undesirable racial effect would also serve the employer's legitimate interest in efficient and trustworthy workmanship." The burden is on the plaintiff, as it should be.

Again, on the next page, the Court uses the term "job-relatedness." In so noting the significance of its ruling, the Court referred to differing lower-Court formulation, comparing more stringent burdens on employer to more reasonable burdens.

So, the Court clearly rejected this standard. It always has.

In *Connecticut* v. *Teal*, Justice Brennan—he wrote the opinion—states that once the plaintiff makes out a prima facie case, "the employer must then demonstrate that any given requirement has a

manifest relationship to the employment in question in order to avoid a finding of discrimination," citing *Griggs*. Again, the term used by the U.S. Supreme Court to describe the employer's showing is "manifest relationship," not "essential to effective job performance," which is impossible to defend yourself on. That's the point.

Again, in the *Dothard* case, using terms like "job-related," "manifest relationship," and "legitimate" interest, the Court construed *Griggs* much differently than S. 2104, this bill, construes it and much like *Wards Cove*, which is consistent with *Griggs*.

Now, those cases make clear that to establish a prima facie case of discrimination, a plaintiff need only show that the racially neutral standards in question select applicants for hire in a significantly discriminatory pattern. Once it is thus shown that the employment standards are discriminatory in effect, the employer must meet the "burden of showing that any given requirement has a manifest relationship to the employment in question."

So, business necessity never meant, as it is stated here, essential to effective job performance, which is impossible to defend against. No U.S. Supreme Court case has really said that.

I might just cite, Bill, your comments in your own statement. Look at page 14 of your very own statement. I will read it exactly:

"In addition *Griggs* and its progeny established a specific order and method of proof in a disparate impact case, specifically assigning the burden of proof on specific issues among the two adversary parties to the litigation. First"—and this is what your own statement says, and it rebuts what you said——

Mr. COLEMAN. Now, wait a minute.

Senator HATCH. No, wait. Let me read it and then you can respond.

Mr. COLEMAN. Well, read it. Stop commenting. Keep on reading it. [Laughter.]

Senator HATCH. Well, I think it rebuts what you said.

Mr. COLEMAN. So far there is nothing wrong, and if what you are saying is you agree with half of me to start, and I hope you hold that position.

Senator HATCH. Well, I agree with some of what you say, but you're wrong in saying that the U.S. Supreme Court, the law prior to *Wards Cove* was as you stated it.

Here's what you say:

"First, the plaintiff must establish a prima facie case by demonstrating that the disputed requirement or requirements had a significant adverse impact on minorities or women." You cite the *Albemarle Paper Company* v. *Moody* case.

"Second, where a prima facie case has been so established, the burden of proof shifts to the employer"—this is before *Wards Cove*—"to prove that the requirement is job related." That is very important. Far different from essential to effective job performance, which is the standard, the new standard, that this bill would like to put up.

"Third, if the employer succeeds in doing so, the plaintiff can still prevail if he or she can show that some alternative requirement would be equally efficacious from the employer's perspective without entailing the objectionable adverse impact. This order and

allocation of proof was, and is, essential to the holding of *Griggs* and to its implementation in the years that followed."

I agree with that.

Mr. COLEMAN. Well, okay.

Senator HATCH. And that is what the law was prior to *Wards Cove*.

Mr. COLEMAN. If you agree with that, I hope you realize, and I hope you really agree, that with respect to section 4 of the amendment, you have accepted half of it.

The CHAIRMAN. Mr. Coleman has been quoted now, and he is entitled to give a response.

Senator HATCH. Well, I am going to give him that opportunity.

Mr. COLEMAN. What you're saying, can you agree——

Senator HATCH. No, I don't agree with——

The CHAIRMAN. Let him just respond. He has been quoted on this.

Senator HATCH. He misconstrued what I agreed to.

The CHAIRMAN. All right. Well, now he is entitled to give a response.

Senator HATCH. Well, then let's make sure he gives a response.

The CHAIRMAN. We will have order.

Mr. Coleman is recognized by the Chair.

Secretary Coleman.

Senator HATCH. Now, wait just a second. I am not going to take advantage of Mr. Coleman. I want to make sure he hasn't misconstrued what I have said.

Now, go ahead, Mr. Coleman, but I tell you, I didn't agree with what——

Mr. COLEMAN. Do you agree that the law at the time of *Griggs*, and the law should be, that the plaintiff has the burden of proving disparate impact, that once he does that, that——

Senator HATCH. Yes, I agree with that.

Mr. COLEMAN [continuing.] The defendant has the burden of proving something, and that burden doesn't shift back to the plaintiff? If you agree with that, then you have accepted at least the first part of the proposed amendment.

Do you agree?

Senator HATCH. I agree that the burden shifts.

Mr. COLEMAN. You what? The burden shifts to the defendant and stays on the defendant?

Senator HATCH. The burden of production——

Mr. COLEMAN. And proof.

Senator HATCH. No, not the burden of persuasion.

Mr. COLEMAN. Well, why not proof? You said that the plaintiff proves what you say he proves, and at that moment the burden shifts. Now, *Griggs* says the burden that shifts is the burden of production and the burden of proof.

Is that what *Griggs* said?

Senator HATCH. That is what I was trying to clarify when Senator Kennedy would not let me finish.

Mr. COLEMAN. *Griggs* said that the burden of production and the burden of proof shifts.

Senator HATCH. No. That's what I was trying to clarify.

Mr. COLEMAN. It doesn't say that?

Senator HATCH. No. It says—I am agreeing with your language of job-related, that that is the standard.

Mr. COLEMAN. No, sir, that's the second——

Senator HATCH. The burden of persuasion does not shift.

Mr. COLEMAN. That's the second part of the problem. I am trying to segregate it.

The first part of the problem is: Do you accept whatever, whether it's the necessity, job, whatever it is, that that is the burden that is on the defendant and it stays on the defendant and it doesn't shift back to the plaintiff?

Senator HATCH. The burden is on the plaintiff to show that the——

Mr. COLEMAN. Consult with your friend in the back.

Senator HATCH. I want to get it right. [Pause.]

The burden on the plaintiff is to show the adverse impact.

Mr. COLEMAN. OK. And he shows that, based upon everything that happened, there is a disparate impact.

Senator HATCH. And the burden on the employer is——

Mr. COLEMAN. And at that time—okay, the plaintiff now gets over the motion to dismiss.

Senator HATCH. Right.

Mr. COLEMAN. The defendant puts on a case. And what does the—the defendant has the burden of producing evidence which shows what?

Senator HATCH. That his business practice was job-related.

Mr. COLEMAN. And does he have the burden of proof with respect to that issue?

Senator HATCH. No.

Mr. COLEMAN. Why not?

Senator HATCH. Once he shows that the business practice was job-related, the plaintiff still has the burden of persuasion to show that that was not job-related, that basically it was prejudicial and discriminatory.

Mr. COLEMAN. Well, then that is not what *Griggs* says.

Senator HATCH. Oh, yes, it is.

Mr. COLEMAN. *Griggs* does not.

Senator HATCH. Yes, it is.

Mr. COLEMAN. *Griggs* does not, and if you have any problem with it, sir, why don't you go to your friend Posner, who after *Griggs*—where is that quote? Posner is on what page—who after *Griggs* says—at page 21—on *Allen* v. *Seidman*, which is cited after *Griggs*.

Senator HATCH. In your statement, you mean?

Mr. COLEMAN. Page 21: "*Wards Cove* modified the ground rules that most lower courts had followed in disparate-impact cases. Before *Wards Cove* it was generally believed that if the plaintiff in a title VII case showed that a criterion was disproportionately excluding members of a group protected by the statute, the burden shifted to the 'employer' to persuade the judge that the criterion was necessary to the effective operation of the employer's business. *Wards Cove* returns the burden of persuasion to the employee, while leaving the burden of production on the employer."

That is all I have been trying to say.

Senator HATCH. You are citing Posner, a Circuit Court judge.

Mr. COLEMAN. I am citing Posner, who is a good guy.

Senator HATCH. I will go back to the *Griggs* case, which is a U.S. Supreme Court case, not a Circuit Court case.

Mr. COLEMAN. What's that?

Senator HATCH. I think Posner is wrong.

Mr. COLEMAN. Do you think the 11th Circuit is wrong?

Senator HATCH. Yes.

Mr. COLEMAN. When once again they say that this changed the law? Do you think the Harvard Law Review is wrong when it says this changes the law? This does change the law.

Senator HATCH. There's a good chance the Harvard Law Review is wrong, I have to say. [Laughter.]

Yes, I think they are wrong. I think once they prove disparate impact, the employer has to come out and show his device, his employment device, is job-related.

Mr. COLEMAN. To say he proves it is to say that he has the burden of proof.

Senator HATCH. No. All he has to do is say that it is job-related. Then they have to prove that it was not.

Mr. COLEMAN. And if you say that, and if the judge says you're lying through the teeth, it's not job-related, that keeps the burden on the defendant.

Remember how you used to try cases? Come on. [Laughter.]

Senator HATCH. Well, I have to differ with you on that. We will both reread *Griggs* together.

Mr. COLEMAN. The minute the defendant comes in and says, "Oh, I think it's job-related," that the fact that the person has to be related to my sister-in-law because I want to keep it in the family. So that's what he says. He says it's job-related. And you say that that shifts the burden back to the plaintiff?

Senator HATCH. Yes, that's right.

Mr. COLEMAN. Come on, Senator, are you really saying that?

Senator HATCH. Yes. That's what I am saying.

Mr. COLEMAN. Well, then I really think that the statute needs to be amended.

Senator HATCH. That's where we differ.

Mr. COLEMAN. Really, if that's what you're saying, then the statute needs to be amended.

Ms. HUFSTEDLER. Mr. Chairman, if I may, two quick responses.

The CHAIRMAN. Go ahead.

Ms. HUFSTEDLER. Senator Hatch, one, there is nothing odd at all about having the burden of persuasion of an affirmative defense rest upon the defendant. And of course, that is exactly what this is: An affirmative defense.

Senator HATCH. Well, to the extent he has to show that it's job-related, that's true.

Ms. HUFSTEDLER. Now, the second point is I think it would be useful for you to reread the rest of *Dothard* because I would like to call your attention to 433 U.S. at 329.30, in which the U.S. Supreme Court expressly states the *Griggs* test as "essential to good job performance."

Senator HATCH. OK. I just happen to have *Dothard* here.

Ms. HUFSTEDLER. Oh. Fine. If you would please take a look at that.

Senator HATCH. I will. As a matter of fact, I am right on that page.

Ms. HUFSTEDLER. Fine.

Senator HATCH. As a matter of fact, the U.S. Supreme Court did not use "essential to job performance," that standard, in describing the employer's task in a disparate impact case in *Dothard* v. *Rawlinson*, a 1977 case. In that case, a woman challenged the minimum height and weight requirements for prison guard jobs.

Now, in that case, on page 329, the U.S. Supreme Court said that once a plaintiff establishes a prima facie case, the employer must show—and I will just read it to you—the employer must show "that any given requirement has a manifest relationship to the employment in question."

Ms. HUFSTEDLER. Keep reading.

Senator HATCH. Citing the *Griggs* case, the Court goes on to say, "If the employer proves that the challenged requirements are job-related"—you see, that's where we're having our problems. It isn't so much the burden of proof or persuasion that is the problem here, it's this argument that this statutory language that's drafted in this bill is the language of the Court.

Let me read it: "If the employer proves that the challenged requirements are job-related, the plaintiff may then show"—this is what I have been saying—"may then show that other selection devices without a similar discriminatory effect would also 'serve the employer's legitimate interest in efficient and trustworthy workmanship.' "

Now, where you get the essential to job performance is off the next page. That certainly was not an essential to job performance standard in the *Dothard* case.

Two pages later in its opinion, the Court noted that the employer asserted that a certain amount of strength "is essential"—the employer asserted the standard—"is essential to effective job performance."

Ms. HUFSTEDLER. It sounds pretty essential to me.

Senator HATCH. Well, that is what the employer——

The CHAIRMAN. Essential to good job performance.

Senator HATCH [continuing.] That is what the employer argued—not the Court. As a prison guard, they said it was essential.

Now, this was not a standard enunciated or adopted by the Court. Indeed, the Court noted that the employer failed to provide any specific justification for the weight and height requirements.

In other words, the Court here, as elsewhere in the opinions, used the terms "job-related" and "manifest relationship to the employment in question." That has been the law right up until today, even before the *Wards Cove* v. *Atonio* case, and snatching a different phrase out of the context used by the employer and mentioned by the Court. The Court just mentions it so as to illustrate the failure of the employer to provide any evidence whatsoever to support its job requirements. This provides no legitimate basis for characterizing the U.S. Supreme Court precedent in this matter which it states in the prior two pages.

Indeed, 2 years later, in the *New York Transit Authority* v. *Beazer* case——

Mr. COLEMAN. May I respond?

Senator HATCH. Let me finish.

Ms. HUFSTEDLER. All of us read those cases differently from you.

Senator HATCH. How do you read this differently, Judge?

Ms. HUFSTEDLER. And so have the commentators in almost all of the Courts of Appeals that have considered the issue. I think that we are only going to resolve that if we would have a nice little subpoena of the U.S. Supreme Court Justices who wrote the opinions and chat with them about it.

Senator HATCH. No, no. I think you should reread the case, because the case makes it clear that the Court cited that the employer claimed that standard but then the Court turns around and says, "But that isn't the standard."

As a matter of fact, 2 years later, just 2 years later, if you read the case. It's in *New York Transit Authority* v. *Beazer*. That's a 1979 decision. The Court used the job-related standard of *Griggs* again, and it rejected language like that appearing in this statute, which is a massive, massive change over the laws that existed prior to the other.

Now, if they can make a case that that is a change that is necessary, if you can make that to me, Bill, then I will be for this statute. At least this part of the statute.

I don't think you can because I think what that means, if we interpret the term "required by business necessity" to mean "essential to effective job performance," and then all we require on the plaintiff is to show a statistical disparity and accuse the defendant-employer that all of its job-related practices are in violation of that, there is no way that defendant can defend himself except one way: That defendant is from that point on, and every other employer in the country, is going to have to build a proportional workforce or a quota-determined workforce in order to avoid these lawsuits because they can't defend themselves.

Mr. COLEMAN. Why, then, in this country——

Senator HATCH. And that's what's wrong with this statute.

Mr. COLEMAN. Why, then, in this country today don't you have that situation existing, because *Griggs* existed for 18 years.

Senator HATCH. Because the bill's standard doesn't exist in the law. That's my point. You say that you want to restore to the law that it was before *Wards Cove* v. *Atonio*, then let's restore it to the job-related standard that it was. If you do that, I will go along with you.

But if you want to do it with this impossible standard for all employers, small-business people included, to meet, then what you're doing is creating litigation ad infinitum until it dawns on the employers that we either proportionately pick our employees regardless of whether it's good for the business or bad, regardless of what the full business program is, or we are going to get sued to death and we are going to get sued in ways that we can't answer the complaint.

Mr. COLEMAN. Sir, I am taking up too much time, but I would like you to do two things.

Senator HATCH. We both are.

Mr. COLEMAN. One is to reread the testimony.

Senator HATCH. I will.

Mr. COLEMAN. And you will realize that you have conceded half of this bill because you have said that the burden is on the defendant to produce some excuse as to why he did what he did. Is that right?

Senator HATCH. All he has to show is that his practice is job-related.

Mr. COLEMAN. But wait a minute. That's his burden.

Senator HATCH. He has to do that, yes.

Mr. COLEMAN. And he has to prove that burden.

Senator HATCH. No, he doesn't. No, he doesn't. Then the plaintiff has got to prove that it is not job-related—as it should be.

Let me give you another illustration.

Mr. COLEMAN. No, wait. Yes, but that doesn't shift——

Senator HATCH. Why should he have to defend himself?

Mr. COLEMAN [continuing.] That doesn't shift the burden of proving whether it's job-related back to the plaintiff. That's what the defendant has to prove.

Senator HATCH. Sure, the plaintiff has to prove that it was not job-related.

Mr. COLEMAN. And *Wards Cove* says that he doesn't have to prove it, that the burden, the mere fact that the defendant comes in and produces something, that that burden goes back to the plaintiff.

Senator HATCH. Well, you and I are going to get together afterwards, and we will go over it thoroughly.

The CHAIRMAN. Fine.

Senator HATCH. Let me just make one more point.

The CHAIRMAN. A brief one, because we do have the next witnesses.

Senator HATCH. Yes, we do.

I would just like to point out that every U.S. Supreme Court disparate impact case has involved a specific, not a generalized or blanket employment practice, not all of the employers' employment practices, as this bill would require. In a disparate-treatment case, *McDonnell Douglas* v. *Burdine*, you name it, the burden of persuasion is always on the plaintiff.

Now, isn't an employee accused—I have to ask it—isn't an employee accused of intentional discrimination a more culpable action than an employer accused of using a neutral device with a disparate impact? And if that is so, I think we would all have to admit that is so. And why should we place a heavier burden on the employer in the disparate impact case than in an intentional discrimination case? And that is what this bill does.

Ms. HUFSTEDLER. Unfortunately, I disagree with you again. Just one more thing, because it has been significantly extended, but it may be of interest generally, Senator Hatch, that Charles Fried and Brad Reynolds read *Dothard* just as I have stated it to you and so stated in the brief in the *Wards Cove* case.

Senator HATCH. Well, I will be interested in reading that.

Mr. COLEMAN. You don't realize it, but you have put your finger on why and how the U.S. Supreme Court went wrong.

Senator HATCH. Well, we will sit down and chat.

Mr. COLEMAN. If you're going with an intentional discrimination case, and I say that based upon A, B, and C the defendant inten-

tionally discriminated against me, and the defendant comes along and says, "No, I didn't. I did it for this reason; namely, that I need a person that understands physics and this plaintiff doesn't understand physics," in that case that proof goes to what my original burden was: Was there intentional discrimination?

Senator HATCH. OK.

Mr. COLEMAN. And therefore I keep the burden.

But in the disparate impact case, that once I show that the workforce is such that there has been a disparate burden——

Senator HATCH. You're saying everything shifts to the defendant at that point?

Mr. COLEMAN. That shifts to the defendant the same way the defendant would say, "The reason I am not liable, Judge, is that they gave me a release, and therefore I don't have to pay the money." And that stays on the defendant.

And the reason where Justice O'Connor made the mistake was that when she said, in an impact case, when there is subjective reasoning, that I concede you can still have a disparate impact case but because I am now hearing a subjective reasoning, that that puts the burden back on the plaintiff. And she's wrong. It does in an intentional case; it does in a disparate impact case.

Senator HATCH. Let me make a suggestion, because we need to move on. You and I are friends. We are going to sit down and we're going to discuss this more fully. I would like you to reread *Dothard* because I don't think it makes the point that you make. In fact, I think it directly makes the opposite point.

But be that as it may, I appreciate hearing all of you and hearing the testimony, and I will reread the testimony as well.

The CHAIRMAN. Briefly, Judge Hufstedler.

Ms. HUFSTEDLER. Mr. Chairman, about three quick sentences on a different item that Senator Hatch discussed earlier.

First, in the case of the fireman, the white firefighters knew all about the action and simply sat on the sidelines and did nothing.

It is impossible to have an effective civil rights statute applying to governments, fire departments, police departments, if you have to do it fire station by fire station. You can't do that. It has to apply throughout the city, of course. And that's what happened here.

Second, there is nothing at all odd about having persons who are adversely affected by a judgment be disentitled from collaterally attacking it. That is the law generally.

Every time, in the business case, Jones and Smith fight over the title to a parcel of real property and both of them have made agreements with third persons to sell that parcel of property to them, it is perfectly obvious that the would-be purchasers, one of them is going to be hurt, depending upon who is ultimately adjudicated to have title to that property.

But that doesn't mean that the disappointed purchaser who happened to buy it from the chap who turned out to own it can go and collaterally attack that judgment, except on the very, very narrow grounds where there has been a species of fraud on the Court, very narrow grounds indeed.

And that is all this statute does. In fact, it makes it more orderly than that.

The CHAIRMAN. Well, we really have to move on.

Senator HATCH. Just one thing on that, if you will give me 30 seconds.

The CHAIRMAN. Briefly. Thirty seconds.

Senator HATCH. That is considerably different factually from a consent decree that determines issues between two different parties, the city and county and the minority, and excludes the rights of others, the other firefighters.

So it is a different situation, and I just don't think you can take away people's right to have their day in court under those circumstances.

But be that as it may, I will submit further questions.

The CHAIRMAN. I would just make one comment. There has been reference to the *Dothard* decision, and there has been reference to this specific language. You said, "In the District Court, however, the appellant produced no evidence correlating the height and weight requirements for the requisite amount of strength thought essential to good job performance."

They didn't supply that information. But as I understand the readings set that as the test, and then it goes on, "Indeed, they failed to offer the evidence of any kind in specific justification of the statutory standards," which was just recently read.

But what wasn't read was the footnote in that particular language. And I will include the whole footnote that said, "In what is perhaps a variation on their constitutional challenge to the validity of title VII itself, the appellants contend that the establishment of minimum height and weight standards by the statute require that they be given greater deference than is typically given private employer-established job qualification. The relevant legislative history of the 1972 amendments extending to title VII to the States as employers does not, however, support such a result."

"Instead, Congress expressly indicated the intent that the same title VII principles be applied to government and private employers alike." It mentions a number of cases and says, "Thus, for both private and public employers, the touchstone is business necessity."

Senator HATCH. No problem.

The CHAIRMAN. So the only—if the Senator will permit others to continue their thoughts—those exact words have been included, required by business necessity means essential to effective job performance. Those are the items which have been included, and the footnote continues, "*Griggs* v. *U.S.*, a discriminatory employment practice must be shown to be necessary to safe and efficient job performance—safe and efficient job performance—which are the words we have used.

We will thank you all very much.

We will permit others to submit some questions to you and include those in the record. And we are very grateful to all of you.

Mr. COLEMAN. Thank you.

Ms. HUFSTEDLER. Thank you.

Mr. MARSHALL. Thank you.

The CHAIRMAN. Our next panel consists of two very distinguished witnesses from the well-known hotbed of conservative thought, Cambridge, MA: Charles Fried and Glenn Loury.

Charles Fried served with distinction as solicitor general of the United States during the Reagan administration; he is currently Carter Professor of General Jurisprudence at Harvard Law School.

We are pleased to welcome you to the committee.

Glenn Loury is currently on leave from the Kennedy School of Government at Harvard University. He has written numerous articles on civil rights issues. We are pleased to have him here today.

Professor Fried.

STATEMENTS OF HON. CHARLES FRIED, CARTER PROFESSOR OF GENERAL JURISPRUDENCE, HARVARD LAW SCHOOL, CAMBRIDGE, MA, AND GLENN C. LOURY, PROFESSOR OF POLITICAL ECONOMY, KENNEDY SCHOOL OF GOVERNMENT, CAMBRIDGE, MA

Mr. FRIED. Thank you very much, Mr. Chairman, and the members of the committee.

There are various details in this bill which I won't focus on in my preliminary statements. I very much agree with the fix on *Patterson*, the fix on *Lorance*. I agree with about half of the fix on the *Price Waterhouse* case, and in fact all of those fixes comport with positions that I took as solicitor general.

And I will say right now at the outset, before getting into the things I want to focus on, that I can't get as excited as my very good friend Senator Hatch about the burden of proof point. And maybe when we have a colloquy, we can talk about that, because the two things that really upset me about this bill, the two things which I think are really serious look kind of technical. You don't see them; they don't jump out at you. And yet, together, they have a perfectly devastating effect.

I think those are the two provisions which respond to *Wards Cove* and they say that if the plaintiff, the disappointed employee, the would-be employee, has come in and shown a disparity in the workforce, he can point in a very general way to everything that the employer does and say somewhere in there is something which is doing it to me. And that's one change: He does not have to prove the causation. That is not part of his case.

And the second thing which this bill does which I think is devastating is to change business necessity from a notion of reasonableness, manifest relation to employment, to essential.

Those are the two things which I think end up creating a situation where employers are going to say, "Gee, we don't want to fuss with this. We will just hire by quota."

Now, I know that the proponents of this bill find that forcing quotas on employers who are innocent of any wrong and not as a remedy is as deplorable as I do and as the American people do.

But I am not talking about the motives. I am applying an effects test to this legislation, and what I would suggest is that it is the effect of those two changes—and those are the only two changes that I have in my sights here—that have that effect.

Let me show you why, at least why I think it has that effect.

In a disparate-impact suit, a plaintiff gets into court by showing that the employer's numbers are bad, that the employer is not

hiring or promoting according to the proportion of women or minority workers who are available.

And here I must disagree with my good friend Bill Coleman, it does not mean in proportion to those people who have actually applied for the job. You don't have to have a pool of people who have actually applied. The *Wards Cove* case is actually a good example of that.

So that is how you make your case in the beginning. That is how you get into court.

Then, what you do is you allege that some specific hiring practice or job requirement is having this disparate effect, is keeping the numbers down below the proportion of available minorities and women. And of course, those practices and requirements can be very many. They can vary from where the employer advertises, what educational qualifications he imposes. Does he require tests? Does he require interviews and recommendations? It might even include the location and the hours of his employment office.

All of those things might be in there as burdens. And in fact all of those things might, under appropriate circumstances, operate as a burden.

For instance, if you have your employment office open for certain kinds of work only at inconvenient hours, it might exclude minorities and women from being able to apply.

Now, this bill says that a plaintiff can win his case and brand the employer as a discriminator and get backpay and lawyers fees for himself and others by showing that the employer's numbers are wrong, that he is not hiring up to quota, and that somewhere, somehow, in that long list—and if I know plaintiffs' lawyers, the list will be very long—there is something—and he doesn't have to tell you what—there is something which is producing that effect.

Now, the employer can defend himself, no doubt, but only by showing that every one of those things that he does in that long list which the plaintiff has produced, every one off those lists is essential, not manifestly related, not just reasonable, but essential. And as I know what the word essential means, that there is nothing else he can do.

My goodness, that is very strong medicine indeed. Now, what employer is going to go to the expense of proving, what employer is going to go to the expense of running the risk of backpay and lawyers fees and stigmatization on the chance of shouldering the impossible burden that every single thing that he does, that the plaintiff's lawyer has pointed to, every single thing is essential?

Now, it seems to me what he is going to do is say, "Gee, I don't want to bother with that. I will just make sure my numbers come out right at the outset; in other words, hire by quota and save myself that trouble."

Now, it seems to me that is the inescapable effect of those two things which the bill does: Removing the causation requirement so that the plaintiff does not have to show which of the employer's practices are keeping him below quota, are producing the disparate impact; and second, by forcing the employer to show that these requirements, all of them, are not just reasonable but essential.

I don't think that MIT or CalTech can prove that a Ph.D. is essential to a job as an assistant professor there. It's reasonable, but I

don't think they can prove it's essential. I don't think they can prove that accomplished research is essential to tenuring a professor.

And look at the things that you do when you hire your staffs. Look at the things you look for. You look for political skills, experience, recommendations, people skills, and education. Can you prove that all of those things are essential? No. They are reasonable. But I don't think you can prove they are essential.

And if you wouldn't want to have to answer on that standard, if you wouldn't want to have to show that all of those things are essential, I don't think you should ask every single employer in this country to show that the things that he does are essential rather than just reasonable.

So that is what bothers me about this bill. There are other parts about the bill which I think are terrific, and I am right behind them. And there are other things about which I think reasonable people can differ.

But these two things, causation and essentiality, I think are just devastating.

The CHAIRMAN. Thank you very much.

[The prepared statement of Mr. Fried follows:]

PREPARED STATEMENT OF CHARLES FRIED [1]

1. Introduction

The bill we are considering does some very good things, which need to be done. It also contains some provisions that are unfair, extreme, and dangerously, pointlessly intrusive into the inner workings of private businesses and institutions of all sorts.

I use as my major premises the principles that Hubert H. Humphrey set out in the great debate which led to the Civil Rights Act of 1964.

(I) Discrimination (public or private) on grounds of race, sex, religion or national origin is wrong in itself, injures us as a community, deprives the most vulnerable among us of what they want most—the opportunity to work and contribute—and deprives the community of the contribution of those who are excluded. In short, it is wicked, harmful and inefficient.

(II) No employer who is not discriminating should be forced—directly or indirectly—to hire someone just because of their race, in order to maintain some kind of numerical ratio of proportionality in its work force. Quotas, by whatever name and under whatever disguise, are as loathsome as the discrimination they are supposed to remedy.

(III) As we work to stamp out discrimination and to open opportunities which discrimination had closed off, we must avoid unnecessary intrusion into the way businesses, labor unions and private institutions manage their affairs.

I also take as a fixed premise what the U.S. Supreme Court has said many times, but definitively last Term in *City of Richmond* v. *Croson*: that the Fourteenth Amendment of the Constitution protects all persons alike, that the use of racial classifications of any sort is always highly suspect, and that the Constitution is as hostile to racial discrimination that calls itself "benign" as it is to racial discrimination of the old fashioned kind.

2. Responding to *Patterson* v. *McLean Credit Union*

The bill does a very good thing here: it extends the protection of the Reconstruction Civil Rights Act, what is now section 1981, to some very ugly and demeaning forms of discrimination which the U.S. Supreme Court in the *Patterson* case last Term held were not covered by that statute. By the amendment that is proposed in this bill, acts or discrimination after a person has been hired are as actionable as racially motivated refusals to enter into the employment relation in the first place. Such discrimination, for instance, the harassment and denial of promotion opportunities which Ms. Patterson had to endure, are as harmful, as demeaning and as

[1] Carter Professor of General Jurisprudence, Harvard Law School, former Solicitor General of the United States.

pointlessly wasteful of our citizens' capacities, as discriminatory refusals to hire. Indeed it might be said that from a human point of view it is worse for a person to be subject to demeaning treatment in a job they have come to rely on than to be foreclosed from getting into the situation in the first place.

the U.S. Supreme Court held that its limiting construction was compelled by the words of the statute itself. As Solicitor General I filed an amicus brief on behalf of the United States suggesting a way that the Court could reach a more generous result without yet doing violence to the words of the statute. The Court rejected that suggestion. The present bill, because it is not interpreting the statute can go further than I suggested at the time, and I believe it is quite proper to propose this more comprehensive treatment. The only word of caution I would enter is that the Committee consult with experts and interested persons to make sure that there is not any unnecessary and confusing overlap with other statutes—particularly title VII—in a way that may provoke unnecessary litigation and undermine the conciliation function of the EEOC.

3. Responding to *Lorance* v. *A.T.&T. Technologies*

Another good piece of work the bill would accomplish is reversing the result in the *Lorance* case so as to give persons injured by improper and discriminatory seniority plans a fair chance to challenge them. The U.S. Supreme Court's decision in that case came from no hostility to the Justice of the claims, but from a sense that the Court was boxed in by its prior decisions interpreting Title VII. Again as Solicitor General I had filed a brief on behalf of the United States arguing that this unfortunate conclusion was not a necessary one, but the Court rejected our argument. I am glad that the bill would extricate the law from a box it did not seem to me it really was in.

I should add that the impulse behind this provision—that a victim of discrimination should have a fair and generous opportunity to come to court and seek relief—is not consistent with what this bill proposes in its section 6, the section supposed to undo the U.S. Supreme Court's decision in *Martin* v. *Wilks*. There is an unfortunate suggestion in this inconsistency. There is the suggestion that the grievances of the women who were barred in *Lorance* were real grievances, deserving a fair hearing, while the grievances sought to be raised in the *Martin* case were somehow not to be taken quite as seriously, not to be treated as generously.

4. Responding to *Wards Cove Packing Co.* v. *Atonio*

This brings me to Section 4 of the Bill, which responds to the U.S. Supreme Court's decision in the *Wards Cove* case. This section comes as close to anything I have seen in federal legislation to imposing quota hiring throughout the private sector. The word quota is not used. The language is technical. Indeed, unless you are familiar with the statutes and precedents which this section would supplement, you would not get a glimmer of this. Yet set in its context of existing law and litigation realities, this provision threatens great harm. It would force employers to use quotas in hiring or else expose themselves to law suits they cannot win. And it encourages courts and plaintiffs' lawyers to substitute their one-sided, inexpert judgment of how the private institutions of this country should run their businesses for that of the owners and managers and entrepreneurs and administrators who manage the private businesses and institutions—profit and not-for-profit—of our country.

Section 4, like the *Wards Cove* case and the *Griggs* case, which *Wards Cove* clarifies and develops, address an important and difficult issue in discrimination law. Title VII of the Civil Rights Act was directed at intentional discrimination. That is the root evil. But early on the courts recognized, and in 1971 the *Griggs* case acknowledged, that employers and unions can erect (or maintain) barriers to minority workers without necessarily having had any evil intent—at least at the outset; and yet the barriers may be just as exclusionary as the worst bigotry. The most obvious examples were the rules in some unions giving preference or limiting membership to relatives of existing members. Now this was not intended to exclude minority workers, but since few if any minority persons may have been members of certain unions at the time the Act was passed, the barrier was a formidable one, and very unfair. I would liken this to someone who perhaps quite innocently puts an obstacle in the public highway. Once he knows or should know of the hazard he has created he is responsible for the harm he causes, even if he acted innocently at first. The *Griggs* case and the so-called effects test (or disparate impact test) address this problem. The idea is that if you have an employment requirement or test or procedure which operates as a barrier to minority opportunity, and there is no real reason to maintain that barrier, you should remove it and open the way to opportunity. That is the idea, and it is a good and fair one.

It is a good idea, but I am sorry to say that there are those who do not accept—they have never accepted—Hubert Humphrey's second principle: his abhorrence, an abhorrence shared by most Americans, to quota hiring. There are some who, from the best motives, would just force businesses and schools and colleges and institutions of every kind to hire workers and accept students and give contracts so that minority persons got a fixed share, would force all these institutions to meet a quota.

The reason this is wrong (the reason even the proponents of quotas rarely come right out and defend them by name) is because quotas are an insult to the diversity and freedom and sheer orneriness of the American people. People in this country just do not like to be forced into categories. They like to be viewed as individuals, and they like to view others as individuals. People want to be judged on their merits. The quota mentality—however admirable its desire to open things up to the disadvantaged—regiments and categorizes in a way that the American people rightly resist. We simply do not want to get into a situation where factories and offices are made to hire certain people or certain kinds of people because of a political decision that this is who should be getting the jobs. One can have an interesting philosophical discussion about how much regulation there should be of the private sector, but when politics starts controlling who gets jobs in the private sector we have moved right out off the map of what the American people find acceptable.

Banning discrimination is in the best of our traditions of treating all persons alike and as individuals. But quotas are not like that. They violate both the second and third of Hubert Humphrey's principles. They bureaucratize and politicize what is at the heart of having a private sector. They are social engineering at its worst.

Let me come back to Section 4 of the bill and *Griggs* and *Wards Cove*. It made sense for the law to extend the prohibition against employment discrimination to tearing down pointless barriers to minority opportunity. But that sensible goal was allowed by some lower courts and by the threat of law suits to turn into pressure for quota hiring. It is that tendency that the U.S. Supreme Court addressed in the *Wards Cove* case. Section 4 of this bill is not fine-tuning. It is a radical and heavy-handed rejection of what *Ward's Cove* was all about. It would be the closest thing in our law that I have seen to force quota hiring on practically every employer in the country.

Of course the Section does not say so. But any reflection on how it works makes that conclusion inescapable. This is how it works. A plaintiff accuses an employer of employment discrimination. What he shows to get into court is that the employer has a lower proportion of minority employees than is available in the work force.[2] He has not met his quota. Then the only other thing the plaintiff has to do to win is to point to a list (and you can be sure it will be a very long list) of that employer's various practices and requirements: where it recruits, where it advertises, when it accepts applications, what qualifications it may impose, that it requires interviews, references, and so on. According to Section 4, that list and the failure to meet a quota standing alone mean that the plaintiff wins. There is something very wrong with a law that would do that. The private businesses and institutions of this country should be very frightened of it.

One of the things the *Wards Cove* case said was that before a plaintiff could win a *Griggs*-type case he would have to show not only that the defendant employer is hiring too few minority persons; he must also make the connection between the failure to come up to quota and whatever practice or requirement he is complaining about. It is not enough, said the U.S. Supreme Court, just to say the numbers are wrong. You must prove that something the employer is doing is making them come out wrong—and that means proving which of the many things every employer is doing are having this effect.

And it is this very sensible clarification of the law in the *Wards Cove* case that section 4 wants to reverse. This is the so-called causation requirement, and (b)(i) of section 4 of this bill says that the plaintiff "shall not be required to demonstrate which specific practice or practices within the group (of practices the plaintiff has pointed to) results in such disparate impact." This is extreme and very unfair.

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[2] Under existing law, and certainly under the law as clarified by the U.S. Supreme Court, the plaintiff would have to show as part of his prima facie case that the pool he is talking about is only the pool of *qualified* candidates. So a university could say that the pool it is to be measured against is only people with Ph.D.s. Under the bill, of course, that answer would be cut off. The plaintiff would allege that it is precisely by using a doctoral degree as a requirement that the university is discriminating. And then the defendant could only win by itself proving that a Ph.D. was essential to teaching there—not just one reasonable and proper way to run a university among many people might argue about.

The other thing the bill does, which is extreme and unfair and interferes drastically with the prerogatives of the private sector, is tucked away in a definition clause, section (2)(o): which defines business necessity as "essential to job performance." The common sense of *Griggs* and the common sense of disparate impact litigation has generally worked like this: Once a plaintiff has shown that an employer's test or procedure or requirement operates as barrier to minority workers, the employer can defend himself by showing that that job requirement is imposed for a reason legitimately related to running its business, and not as a pretext for keeping out minority persons or just as a pointless barrier left in place out of habit or indifference. And that is another thing the *Wards Cove* case made clear: that an employer can defend itself by showing that what it is doing is reasonable in terms of the kind of business it is.

What that innocent-sounding phrase tucked away in that definition clause of section (2) of this bill would do is to take away that defense from an employer who has not met his quota, and let it have the defense back only if it can prove that the requirement is *essential*. Now the word "essential" is strong stuff. It means an employer cannot run its business in any other way. How many requirements that a business or institution, say an airline or blood bank or college, imposes are "essential"? Very few. They are usually reasonable, sound ways of doing business. They are judgment calls. They are the kinds of exercise of discretion that makes us a diverse and free economy and society—people doing things their way, because they reasonably think that the economy will prosper or students will learn better, or you will run a safer airline, a better hospital or research laboratory if you do things this way. Substitute the word essential and you kill all the discretion that gives us our diversity and creativity. This is an example of people with only one thing on their mind using the blunt instrument of the law to make every business and institution in the country—though innocent of discriminatory motives—answer to their purposes. It is the worst kind of regimentation.

Of course you can avoid having to answer to a plaintiffs lawyer and court about how you run your business and why what you do is essential to it. You can avoid being regimented in that way—by quota hiring.

Let me be clear. I do not say that any requirement or qualification can be imposed so long as it is not a pretext for discrimination. I think it is reasonable to make an employer at least offer an explanation why what he is doing is reasonable to his legitimate purposes. But to use the word "essential" is to go thermonuclear.

And the bill goes even further in driving employers towards quota hiring. As hard as it is to defend any particular challenged employment requirement as essential, the bill really makes it impossible for the employer to succeed. Since the plaintiff need not prove which of a potentially long list of requirements he points to is causing the bad numbers, the bill in effect makes the employer prove every one of them is essential. Only then can the employer escape liability and possibly heavy money damages.

In sum, what the bill says to every private employer in the country—business or non-profit—if you do not engage in quota hiring you will be open to a law suit that will be long and expensive to defend, and which in the end you cannot win. So in the guise of introducing minor adjustments in the law, this bill is one of the most radical and extreme intrusions into private sector autonomy introduced in recent times.

5. Responding to *Martin* v. *Wilks*

Martin v. *Wilks* responded to a dilemma the law has faced in a number of areas: whether (a) to require interested parties to intervene in litigation that effects them or be precluded by its results or, (b) to require the litigating parties themselves to bring these outsiders into the law suit if they wish to bind these outsiders. The Federal Rules of Civil Procedure have chosen the second route as a general rule, because of the constitutional requirements of the due process clause that hold that a person may not be bound by litigation in which he has not been represented and has not had a fair opportunity to be heard. The federal rules made this choice because preclusion would only be constitutionally permissible if these third parties had received actual notice of the litigation, and that is often extraordinarily difficult to accomplish and difficult to prove. All the Court did in the *Martin* case is to apply this general rule to civil rights cases where third parties—usually white males—claim that the arrangements reached by the litigants in a consent decree violate these third parties' constitutional rights.

Now I cannot avoid the fear that much of the hue and cry about this decision comes from those who really do not believe that these white males have any real constitutional rights to be complaining about, and therefore they should not be able to upset longstanding arrangements to assert them. But the U.S. Supreme Court

has told us that they do have constitutional rights. So it is wrong to proceed on the premise that their constitutional rights are any less-worthy of being heard than the statutory rights which this bill quite properly protects in its repair of the *Lorance* case. In this respect paragraph (C) is right off the map. It would allow a third party to be bound by a litigation of which he had no notice, if a court determined that reasonable efforts had been made to give him notice. This violates the constitutional principle that people may not be bound by litigation in which their interests were not represented and in which they did not actually have a chance to participate. It is this provision which suggests that the bill assumes that the rights of these potential intervenors are second rate constitutional rights, and only the constitutional rights of the parties the bill is interested to protect are of the first rate kind. But there are no second rate constitutional rights, just as there are no second class citizens in this country. Paragraph (C) should be abandoned because its premise violates the most fundamental principles of the civil rights movement in this country.

The CHAIRMAN. Mr. Loury.

Mr. LOURY. Thank you, Mr. Chairman, Senator Hatch, and Senator Metzenbaum. I appreciate this opportunity to appear before the committee.

As a professor at the Kennedy School of Government at Harvard, I have for some years now been writing and teaching about the problem of racial inequality in our society. In what follows and in my written testimony, I want to offer a brief survey of the dimensions of that problem, drawn from analyses of the social science literature and statistical data published by various Federal agencies, as I interpret them, with the purpose in mind of providing some context for your deliberations on this proposed civil rights legislation.

I believe it important to understand that antidiscrimination laws provide in the larger context a very limited tool with which to address the general problem of group inequality in our society. Not being a lawyer, I am not commenting on the specific legal controversies raised by the bill.

In my summary here I just want to make several points. While substantial differences in income exist between various ethnic groups and while discrimination against women and minority groups in employment has been and continues to be a matter of concern, there is no sound social scientific basis for concluding that the existing economic differences have been caused by or reflect the extent of employment discrimination against various groups.

Indeed, gross statistical disparities are inadequate to identify the presence of discrimination because individuals differ in many subtle ways unlikely to be identified, measured and controlled for when group incomes are compared.

Accordingly, there is no basis for the expectation that antidiscrimination legislation alone will have anything but a marginal effect on these differences.

Second, in the case of blacks, who arguably have experienced the most severely deleterious effects of discrimination in the past, there has been a truly dramatic reduction in the extent of employment discrimination in the period since the passage of the Civil Rights Act of 1964.

Moreover, there has occurred over the last four decades a pronounced improvement in the overall relative economic status of black Americans, an improvement which started before the Civil Rights Act and which is accounted for by beneficial changes in such fundamental economic factors as improved educational attain-

ment, long-term economic growth, interregional migration, as well as diminished extent of employment discrimination.

The rate of improvement in the relative earnings of blacks has slowed in the last decade, especially for the younger cohorts—and this should be a matter of some concern—which seems to be due to the slowing in the overall rate of economic growth in our economy as well as to the failure of the quality of education available to black youngsters to continue to improve as it has historically done.

Third, despite the long-term upward trend, there nevertheless remain profoundly troubling racial differences in economic advantage which warrant the attention of this committee and of all Americans.

In the case of blacks, the relative labor market gains of individuals have not been matched by comparable gains in the resources available to families. This is because the proportion of families headed by a single parent has risen dramatically among blacks during the same period in which individuals' earnings have improved.

As well, the percentage of black children residing in households in which only one parent is present has risen sharply, indeed continues to rise. Poverty rates among such children are disturbingly high.

More generally, the emergence of what some have called an urban underclass has been noted in many of our cities. Blacks are disproportionately overrepresented in this population, where the problems of drugs, criminal violence, educational failure, homelessness, and family instability are manifest.

It is my conviction that these problems constitute the most important and intractable aspect of racial inequality in our time. Unfortunately, these problems are unlikely to be mitigated by civil rights legislation because they do not derive in any direct way from the practice of employment discrimination.

However, the continued existence of these social problems contributes to the inability of those subject to them to compete effectively in the labor market.

Finally, I am concerned that the politics of civil rights issues have in the last decade taken on a disturbingly symbolic tone and have become divorced from the social reality of racial inequality as it actually exists in our society. This trend is reflected, in my judgment, in the public debates over recent U.S. Supreme Court decisions and the extent to which they do or do not reverse the progress in race relations which we have as a society have made in the last decades.

I am not commenting on the legal correctness of the Court's rulings but rather on the political meaning which has been attached to them by advocates of minority interests. It is my opinion, as a close student of these socioeconomic trends affecting minority groups in our society, that the danger to minority interests of these developments in the law has been significantly overstated.

A far greater threat to the attainment of full social and economic parity for racial minorities is posed by the trends affecting the social, educational, and family life experiences of low-income urban communities. These trends are more difficult to legislate against and do not as readily provide us with villains and heroes. But if

they are not reversed, we will continue to face a serious social and political problem around the issue of race in this country for many years to come.

Thank you.

[The prepared statement of Mr. Loury follows:]

PREPARED STATEMENT OF GLENN C. LOURY

Mr. Chairman, I thank you for this opportunity to appear before the Committee. As Professor of Political Economy at the John F. Kennedy School of Government at Harvard University, I have for some years now been writing and teaching about the problem of group inequality in our society. In what follows I will offer a brief survey of the dimensions of that problem, drawn from analyses in the social science literature of the statistical data collected and published by various federal agencies, as I have interpreted them. I hope with this survey to provide some context for your deliberations on the proposed civil rights legislation. It is important, I believe, to understand that anti-discrimination laws provide a very limited tool with which to redress the problem of racial inequality. I am not qualified to assess the legal issues raised by the legislation, and therefore will not comment on them here.

In this testimony I want to stress several points:

(1) While substantial differences in income exist between various ethnic groups, and while discrimination against women and various minority groups in employment has been and continues to be a matter of concern, there is no sound social-scientific basis for concluding that the existing economic differences have been caused by, or reflect the extent of, employment discrimination against various groups. Gross statistical disparities are inadequate to identify the presence of discrimination because individuals differ in many ways likely to affect their earnings capacities which are usually not measured and controlled for when group outcomes are compared. Accordingly, there is no basis for the expectation that anti-discrimination legislation alone will have anything but a marginal effect on these differences.

(2) In the case of blacks, who have arguably experienced the most severely deleterious effects of discrimination in the past, there has been a truly dramatic reduction in the extent of employment discrimination in the period since the passage of the Civil Rights Act of 1964. Moreover, there has occurred over the last four decades a pronounced improvement in the overall relative economic status of black Americans, an improvement which started before the Civil Rights Act, and which is accounted for by beneficial changes in such fundamental economic factors as improved educational attainment, long term economic growth, and interregional migration, as well as by the diminished extent of employment discrimination. The rate of improvement in the relative earnings of blacks has slowed in the last decade, especially for the youngest cohorts. This is a matter of some concern, which seems to be due to a slowing of the overall rate of economic growth in the United States, as well as to the failure for the quality of education available to black youngsters to continue to improve as it has historically done.

(3) Despite the long-term upward trend, there nevertheless remain profoundly troubling racial differences in economic advantage which warrant the attention of this Committee, and of all Americans. In the case of blacks, the relative labor market gains of individuals have not been matched by comparable gains in the resources available to families. this is because the proportion of families headed by a single parent has risen dramatically among blacks during the same period in which individuals' earnings have improved. As well, the percentage of black children residing in households in which only one parent is present has risen sharply. Poverty rates among such children are disturbingly high. More generally, the emergence of what some have called an "urban underclass" has been noted in many of our cities. Blacks are disproportionately overrepresented in this population, where the problems of drugs, criminal violence, educational failure, homelessness and family instability are manifest. It is my conviction that these problems constitute the most important and intractable aspect of racial inequality in our time. unfortunately, these problems are unlikely to be mitigated by civil rights legislation, because they do not derive in any direct way from the practice of employment discrimination. However, the continued existence of these social problems contributes to the inability of those subject to them to compete effectively in the labor market.

(4) I am concerned that the politics of civil rights issues have in the last decade taken on a disturbingly symbolic tone, and have become divorced from the social reality of racial inequality as it actually exists in our society. This trend is reflected,

in my judgment, in the public debates over recent Supreme Court decisions, and the extent to which they do or do not reverse the progress in race relations which we have made as a society in the last decades. I am not commenting on the legal correctness of the Court's rulings, but rather on the political meaning which has been attache dot them by advocates of minority interests. It is my opinion, as a close student of the socio-economic trends affecting minority groups in our society, that the danger to minority interests of these developments in the law has been significantly overstated. A far greater threat to the attainment of full social and economic parity for racial minorities is posed by the trends affecting the social, educational and family life experiences of low-income urban communities. These trends are more difficult to legislate against, and do not as readily provide us with villains and heroes. But if they are not reversed we will continue to face a serious social and political problem of racial inequality in this country for many years to come.

Income Differences and Discrimination

While incomes vary considerably between racial and ethnic groups, one cannot draw conclusions about the extent of discrimination from such differences. Some groups which have been discriminated against in the past nevertheless have higher incomes than groups which are presumed to have benefited from discrimination. for example, Asian-Americans have experienced considerable discrimination, yet have incomes often exceeding those of whites. (According to the 1980 Census, the family incomes of Japanese-Americans was 30 percent higher than that of whites in 1979.) Discrimination cannot account for this fact, though other factors may be suggested as a plausible explanation. Family income is affected by factors such as the number of family members in the labor force, and the skills which those persons bring to the labor market. Therefore, family structure (whether families consist of husband-wife couples with children, or mothers raising their children alone, e.g.) will be an important determinant of group differences in family incomes. Also, some groups may exhibit a greater amount of family work effort than others, even when the structure of families is similar. For example, 71 percent of Filipino families have two or more earners compared to 55 percent of white American families. (This consideration is important in accounting for the relative family incomes of Chinese, Japanese, Korean and Cuban families as well.)

Individual skills are also important in accounting for differences between groups in income. Educational attainment varies considerably by race and ethnicity. In 1980, only 58 percent of Hispanic men aged 25–29 had completed high school, compared to 89 percent of Asian men, and 73 percent of black men. If one compares the earnings of minority individuals relative to that of whites, varying the degree of educational attainment, it becomes clear that differences in education contribute in a major way to group income differences, because the ratio of minority to white earnings is consistently higher among persons with the same amount of education than it is among all persons. For example, in the 1980 Census black men aged 25–34 are recorded as having hourly earnings at 84 percent the level of whites; yet among men with 12 years of schooling the relative black hourly earnings was 87 percent of whites, and among men with 16 years of schooling the relative black earnings was 90 percent of whites. Moreover, there are differences in school achievement among persons with the same years of schooling which are likely to explain some earnings differences. These differences, reflected in part by variation across groups in students' performance on achievement tests, may be attributed to differences in the quality of schools attended by group members, as well as differences in the education and income of students' parents.

The problem of inferring discrimination from earnings differentials is further illustrated by reference to the relative earnings of women in various ethnic groups. Among women aged 45–54 with a college education, for example, blacks earned roughly 13 percent more than whites in 1979 despite the fact that they probably experienced more labor market discrimination. Some economists have attributed this fact to the greater work experience and labor market attachment exhibited by black women. Labor force participation rates have traditionally been higher among black women than among whites, and black women have been more likely to work while their children are young, a fact which may derive from the higher probability that a black woman would be the sole support of her children.

It is not possible here to offer a complete discussion of the factors determining individual earnings, nor of the reasons why earnings might differ between groups. The preceding discussion is intended to suggest however that employment discrimination is but one, and by no means the most important of these factors, and that the tendency to conclude that discrimination is a problem from the mere fact that groups have differing incomes should be resisted. This point is underscored by the fact that, even within groups usually treated as a single aggregate for the purpose

of discussing the existence of discrimination, one can observe significant differences in economic experience. Black American families of West Indian descent fare much better than do blacks overall, with incomes comparable to those of whites. And among white men, the group usually offered as a basis of comparison for the purpose of measuring the well-being of others, there are significant differences which presumably cannot be explained by discrimination. for example, even after adjusting for education, geographic region and other factors, Jewish men were found in a recent Civil Rights Commission study to earn about 15 percent more, and Italian men 6 percent more, than white men of British descent.

Economic Progress of Blacks and the Significant Remaining Inequality

There has been significant improvement in the earnings experience of employed black workers over the period 1940–1980, as documented by the decennial census data. This improvement is both absolute, and relative to the earnings of comparable whites. This improvement began well before the onset of the civil rights legislation of the 1960's. It is explained in part by the shift of black workers out of agriculture, where they were concentrated prior to the second world war; by the migration of blacks from countryside to city, and from South to North and West which has occurred in this period; by the improvement in the quality and quantity of education attained by black workers, and by a decline in labor market discrimination against black workers. The pace of improvement historically has been greatest when the overall rate of growth for the economy has been greatest (during the 1940's and 1960's, e.g.), and appears to have slowed during the 1980's. This improvement has been relatively greater for more educated and younger workers. However, since 1960 the gains in relative earnings among employed blacks have been accompanied by a pronounced downward trend in the labor force participation rates of black men, a trend which accelerated during the 1970's. Family incomes have not improved among blacks relative to whites in a manner comparable to the change in the earnings of employed individuals.

These earnings gains are reflected in the following data: (estimated annual earnings of fully employed men in constant 1987 dollars)

Mean Male Income by Race

Year	White Men	Black Men
1980	28,212	20,480
1970	28,075	18,078
1960	21,832	12,561
1950	15,677	8,655
1940	11,441	4,956

Source: Smith and Welch, "Black Economic Progress after Myrdal," *Journal of Economic Literature*, June 1989

These average gains have not, however, been enjoyed equally by all black workers. In the past quarter century earnings inequality within the black population has increased. Since 1959 inequality among black men has been greater than among white men, with the bottom 40 percent of black men earning about 8 percent of total black male earnings in 1959, but only 5 percent in 1984; and with the top 20 percent of black men earning about one-half of total black male earnings in 1959, but roughly 60 percent by 1984. This increasing inequality is due, in large part to the fact that an increasing proportion of black men report no labor market earnings at all, because they are unemployed or not in the workforce. Among black men 24 years old the proportion unemployed, out of the labor force or in jail rose from 13.8 percent in 1950 to 19.8 percent in 1960, 21.1 percent in 1970 and 28.2 percent in 1980; for men 35–36 years old the proportions were 13.5 percent in 1950, 17.1 percent in 1960, 13.7 percent in 1970 and 20.3 percent in 1980. Note the sharp rise during the 1970's.

Family income has also become more unequally among blacks. For example, the proportion of black families with incomes over $35,000 (in 1986 dollars) grew from 15.7 percent to 21.2 percent in the period 1970–1986; the proportion with incomes in excess of $50,000 increased from 4.7 percent to 8.8 percent in the same period; yet over this period the proportion of black families with income of less than $10,000 also grew, from 26.8 percent to 30.2 percent . Among two parent households with children black earnings rose 4 percent between 1973 and 1984, while white earnings fell 4 percent. Earnings for female headed households fell for both blacks and whites (by 9 percent and 8 percent respectively), but there are significantly more black

single parent households than white. Moreover, more educated blacks have gained more than less educated blacks from the improvement in relative black earnings. Annual earnings of college graduates rose by 6 percent among black males relative to whites between 1969 and 1984; for those with 8–11 years of schooling the relative gain was 2 percent ; but among high school graduates blacks relative earnings actually fell by 5 percent over this period.

While there is much debate about the causes of these offsetting negative trends, particularly about the decline in labor market participation of black men in the last 20 years, it seems clear that employment discrimination is not a major factor. Most of the discussion has focused on the effects of benefit programs on labor force participation among black men, and on the decline in industrial employment in the urban areas in which blacks are most concentrated. I do not take a position here on this issue, but merely stress that the phenomenon is a complicated one involving many factors.

One feature of the current socio-economic situation of blacks requires particular emphasis, though, and that is the decline in the two-parent household as a context for child rearing. This phenomenon has direct implications for the incidence of poverty among children, and consequently for the prospects of continued improvement in the relative economic position of blacks in the future. Again, it is not possible here to review this situation in detail, but a general impression is conveyed by the following statistics. Between 1960 and 1988 the percentage of black women aged 15–44 married with a spouse present declined from 51.4 percent to 29.1 percent; there was also a decline for whites, though not as pronounced—from 69.1 percent to 54.5 percent. Over the same period, the percent of children living with a married couple fell among blacks from 67 percent to 38.6 percent, while the percent of black children living with a never married parent rose from 2.1 percent to 29.3 percent. These startling numbers suggest the magnitude of the profound change in family structure among blacks which has been going on now for over a quarter century. No one really understands why these changes are occurring, though a proximate cause may be identified in the rising fertility rates during the last decade among never married black women, along with the declining birth rates among married black women, which have been falling for three decades. In any event, by 1988 the percent of births among blacks which occurred to unmarried women had risen to 61.2 percent. Every study of the relationship between family structure, childhood poverty and subsequent social mobility of children suggest that this trend bodes ill for the continuation of historic improvements in the relative economic status of black Americans.

The Politics of Race

For black Americans the struggle for freedom and equality is the central theme in our historical experience. This struggle, in turn, has played a profound role in shaping the contemporary American social and political conscience. Thus matters of race inevitably produce strong feeling when they arise in American politics. The sense that the wounds of the past are being reopened by a Court bent on reversing historic gains is sure to induce alarm among all concerned for social justice. And the continued existence of visible and abject urban poverty disproportionately afflicting blacks, together with the presence in national government of a series of relatively conservative Administrations fuels this concern. No compendium of social statistics is needed to see the vast disparities in economic advantage which separate the inner-city black poor from the rest of the nation. No profound talents of social observation are required to notice the continuing tension, anger, and fear that shrouds our public discourse on matters concerning race.

Today the nation faces a challenge different in character though perhaps no less severe in degree than that which occasioned the civil rights revolution. It is important, though, to be clear about just what the challenge is, and what it is not. the bottom stratum of the black community has compelling problems which can no longer be blamed solely on white racism, which will not yield to protest marches or court orders, and which force us to confront disquieting aspects of lower class black urban society. The profound alienation of the ghetto poor from mainstream American life has continued tc grow worse in the years since the triumphs of the civil rights movement, even as the success of that movement has provided the basis for an impressive expansion of economic and political power fro the black middle class. Finding ways to effectively address the problems of the inner-city poor, of all races, is the challenge which confronts us today, and to which we must respond. If we do so, in my judgment we will have gone a long way toward finishing the job which the original civil rights legislation started, of fully incorporating all of our citizens into the body politic on an equal footing.

I believe it will be helpful in addressing the general problem of racial inequality in American society to be mindful of how limited a role civil rights legislation now plays in impacting the overall situation of the black poor. This, of course, is not to say that civil rights are not important in their own right. Nevertheless, it seems to me that the intensity and emotion which often surrounds debate on this issue derives from its symbolic importance as an indicator of general concern for the condition of racial and ethnic minorities in our society which civil rights issues have assumed. To the extent that this focus on civil rights legislation as a remedy for the more general problem of racial inequality crowds from the public agenda a consideration of the broader causes of that inequality, I believe that long term progress on the fundamental problem will be retarded.

The CHAIRMAN. Thank you very much, Mr. Loury.

Just to comment, I think you will find for the most part, on both sides of the aisle, that members of this committee are as committed and dedicated as you are to trying to deal with those socioeconomic conditions that you have made reference to, in terms of education, in terms of health and health care, in terms of housing, in terms of dealing with the problems of drugs in our cities and in our schools.

I think that that is what this committee basically is all about: Human resource development. And I take special pride in the work that has been done on both sides of the aisle to try to deal with those basic and root causes.

The real question is whether not only in dealing with those—I hear what you're saying, and that is that if we don't deal with those, we're going to move into a more separate society as well, no matter what we do in the courts—but I don't think that that should mean that if we are making an effort in those areas, progress being what it is, that we don't also have a serious problem in terms of the recent kinds of court decisions.

We have, perhaps, some difference in that area, but maybe we will have a chance to come back to those.

I would like to ask, Professor Fried, on *Wards Cove*, we have heard compelling testimony earlier today that our bill merely restores the law to where it was under *Griggs* before the U.S. Supreme Court decision last summer, that the prior bill did not force employers to enact quotas. I think Secretary Marshall and Secretary Coleman pointed that out, and the facts quite frankly reflect that.

I would like to see if we can focus on how our bill responds to *Wards Cove* and get your response on a couple of points. Our bill has three features: First, it restores to the employer the burden of persuasion in justifying practices that have a disparate impact on minorities or women; second, it restores that burden to what it was under *Griggs*; and third, it provides that when an employee demonstrated that a group of employment practices, a combination of employment practices or an overall process results in a disparate impact, the employer must show that the individual practices that comprise that group either don't have a disparate impact or are justified by business necessity.

I would like to set aside the second and third features for a moment—I know they are of concern to you—and focus just on restoring the burden of persuasion to the employer. The employer has a far better opportunity to have the relevant information than the employee does.

And once the employee has demonstrated a practice has a disparate impact, do you see any real problem with placing on the employer the burden of persuasion for legitimizing the practice?

Mr. FRIED. I think we all agree—the Court agreed, the bill provides, Senator Hatch agrees—that the burden of going forward is on the employer. The burden of showing somehow or providing an explanation and the only thing that is being disputed about now is whether the employer, having picked out, and picked out in a way which I would like to say is fair and manageable, he said, "OK, you think that a height and weight requirement is producing an undue burden. Let me explain why I think that is reasonable."

I wanted to let the employer have a target he can get his hands on rather than a target which is so large and so indeterminate he can't get his hands on it.

But we all agree that once he has a target he can get his hands on, he has to come forward with the first explanation. And the only area of disagreement is that, having come forward with that explanation, does he also have the further burden of persuasion?

Now, I am afraid I can't get too excited about that question, because all of these cases are going to be tried to a judge, not to a jury, in a disparate impact case, I believe. So what we have is a situation where the employer has had to come forward with something which is a good explanation. Otherwise, he is not defending. And the only thing we are talking about now is whether, having come forward with an explanation which is a good explanation, he also has to persuade as to that.

I think the idea of switching these things back and forth can get quite confusing, and I don't think it makes an awful lot of difference.

The CHAIRMAN. Well, it does make a difference, don't you think? The employer has that information. For the employee, it is much more difficult, I suppose in many cases virtually impossible, to gather the kind of information that would be able to legitimate the particular provision in the range of different tests or criteria that are being used which resulted in the disparate impact of qualified.

I think it's important that we keep using the "qualified," now because when we just use these others, it conjures up all kinds of other factors which are not included.

But don't you agree that the employer is the one that has the information. He is the one—he or she—is the one that has the material and the employer should be the one that must be forthcoming in justifying the range of different requirements or tests?

Mr. FRIED. Well, we all say that. He has got to come forward in the first instance and give an explanation.

Now, on this point about the qualified ones, and I thought your example of the Lawrence Livermore Laboratory was excellent, I am afraid that when you say in the Lawrence Livermore example, of course we are only talking about physicists, being a physicist is a qualification. And under this bill, the plaintiff can include that in the whole list of things that he complains of.

So that in fact, at Lawrence Livermore, all you have to do is show that you are not hiring up to the proportion in the population, and it is up to the lab to say, "Well, that's because—what—that's because we only hire engineers, and being an engineer with

a degree is a reasonable qualification." He's not going to have a lot of trouble proving that, but he is going to have to come forward and make that claim.

So the word "qualification" I don't think helps us very much.

The CHAIRMAN. Well, Secretary Coleman points out in his testimony that the plaintiff must show what impact the disputed requirements had on qualified actual or potential applicants. Of course, in any disparate impact case, the plaintiff, by definition, is challenging the legitimacy of one or more of the qualifications insisted upon by an employer. Where there are qualification requirements of undisputed legitimacy, a plaintiff must ordinarily take them into account in establishing the prima facie case.

Mr. FRIED. Well, I am glad that the word we used, "actual or potential applicants," because once the proportionality applies to potential applicants, it applies to the whole labor pool that is out there rather than people who have walked into the employment office and been denied. That is a very important point.

Now, it is true that showing that the employer's workforce is disproportionately white isn't enough. The plaintiff has got to point to something and say it's doing that. But under your bill, what he points to can be everything and he doesn't have to sort it out and say which of those many, many things are producing this result. And I think that is what is producing the really unshoulderable burden on the defendant.

I don't think it is so terribly difficult if the defendant knows in a narrow way what he has got to answer that he has got to answer. But if he has got to answer the whole world, it's impossible.

The CHAIRMAN. Well, you in your own brief, the United States, it's been referred to in *Wards Cove*, which you signed as solicitor general, explicitly acknowledged the appropriateness of permitting challenges to groups of employment practices in these circumstances.

You point out: "Of course, the decision rule for selection may be complex. It may, for example, involve considerations of multiple factors, and certainly if the factors combine to produce a single ultimate result, it is not possible to challenge each one. That decision may be challenged as a whole."

Mr. FRIED. Senator, that—and here I must say that what one does when you write a brief for the government you don't just put in everything that makes your case more comfortable. You don't exaggerate it, and you acknowledge difficulties. And that is a difficulty. Where you have an employment requirement which really is made up of several different pieces and you understand that you can't pull it apart.

But that is not what your bill does. Your bill doesn't talk about that here. It says, "and it is not possible to challenge each one." Your bill doesn't say that you don't have to specify where it's not possible to challenge each one. Your bill says that you don't have to specify at all, ever. And that, I think, is the difference, and that, I think, is what Secretary Coleman missed in his response to my op-ed piece.

It is where you really have one ball of wax and it's not possible to undo it.

Senator HATCH. And in his response to me.

The CHAIRMAN. Well, that is certainly the concept which we have accepted there. Maybe there is something we are missing here. I don't believe so, but we will welcome any thoughts that you have on that.

Let me just end because the time is running on.

Have you reached any conclusion that, after *Wards Cove*, that led you to believe that there has been some kind of quota system that has been established by *Wards Cove*?

Mr. FRIED. I am not—I don't have access to statistics. I just have my common sense, and my common sense tells me that if you tell employers that the only way they can defend themselves is by burdens which are unmanageable, they will not get themselves into the situation in the first place.

But I don't have any such statistics.

The CHAIRMAN. Well, I meant *Griggs*, under *Griggs* decision. Did you gather, when you were doing your research in terms of the preparation of your own kind of brief, that the results of the *Griggs* led to quotas?

Mr. FRIED. I don't think that there was a general move toward quotas.

The CHAIRMAN. Well, was there any? You submitted this, the brief, and the idea of quotas is not something that is out in thin air.

Can you just answer the question whether you had any information that led you to the conclusion that *Griggs* had required the development of quotas?

Mr. FRIED. Well, Senator, it's because we didn't think that this brief involved a change in *Griggs*. If we thought there were quotas out there that *Griggs* was producing, we would say, "Change *Griggs*." But I don't accept the premise that *Wards Cove* changes *Griggs*; and therefore that wasn't the kind of factual basis that I felt we needed in order to ask the Court to change *Griggs* because we didn't think we were asking the Court to change *Griggs*.

That's the best I can do.

Senator HATCH. I want to tell you how much I respect you, Mr. Loury, and the research and work you've done, and I think we ought to let him catch his plane.

Mr. LOURY. I am amenable to that.

Senator HATCH. Is that all right, Mr. Chairman?

I will send questions to you in writing if I can.

Mr. LOURY. Very good. Thank you.

The CHAIRMAN. Thank you very much.

Mr. LOURY. Thank you, Senator.

Senator HATCH. Thank you so much for being here.

Now, Mr. Fried, first of all, did *Wards Cove* overrule the *Griggs* case, in your opinion?

Mr. FRIED. No, I really don't think it did.

Now, what happened was, after *Griggs* there were hundreds of lower-court opinions, and they of course interpreted the law in a variety of ways, and there was a certain measure of confusion down there.

Senator HATCH. That's right.

Mr. FRIED. And what *Wards Cove* did is it clarified and focused *Griggs*. But I do not believe it overruled it. I think that is a really serious overstatement.

Senator HATCH. By Mr. Coleman?

Mr. FRIED. I believe so, yes.

Senator HATCH. I believe so, too. I don't believe there is any question about it if you read the cases.

What you seem to be saying is that this language in this bill which says the term required by business necessity, which is a standard that has been used, the words "business necessity," means—this is what they write in—"essential to effective job performance," that that would be a new standard that has never been used.

Mr. FRIED. I believe that is a new standard. The word "necessary" in legal usage covers a multitude of sins. And I think you have given many good examples from the cases which show that what it has meant is manifestly job-related, related to the job, or something of that sort.

I think of the Constitution itself, there is a list of your powers as a Congress, and then it says, "and anything else which is necessary and proper." And Chief Justice Marshall, in one of his first important decisions, said, "That, in effect, that doesn't mean essential, that means just reasonable." And that is what the word "necessary" has meant in legal usage, really forever. It does not mean something as tight and severe as essential. That is the innovation.

Senator HATCH. And business necessity fits in that category?

Mr. FRIED. I think so. Business necessity is a standard very much like the standard of necessity under the "necessary and proper" clause, which is not very constraining, you have noticed.

Senator HATCH. That's right. Once you put the word essential in there, then you create coupled with the blanket charge of all of the employers' employment standards, then make an impossible burden for any employer to defend themselves.

Mr. FRIED. Well, the way I think that the Congress might see that best is if we proposed changing the Constitution so that the enumerated powers of Congress would be elaborated only insofar as it was essential to the enumerated powers. That would be a very big change, and that is the very big change that this statute or this bill proposes.

Senator HATCH. Where Mr. Coleman and I got into a conflict that I was not very articulate on, I have to say, is once the plaintiff shows disparate impact, then the defendant employer has to come forward—and in the prior cases they would have to show disparate impact—the employer would have to come forward and show why his standards were job-related, why his business approaches were job-related. He had the burden of production at that point.

Mr. FRIED. That's correct.

Senator HATCH. That's different. That's different from the burden of persuasion.

Mr. FRIED. It is different from the burden of persuasion, and the only quarter-of-inch difference I have with you, Senator, is that I think in the real world of litigation——

Senator HATCH. That's not as important?

Mr. FRIED [continuing.] It doesn't make such a big difference, so long as the burden that the defendant has is a manageable one, not an unmanageable one.

Senator HATCH. It is a reasonable burden.

Mr. FRIED. Correct. And a reasonably focused burden.

Senator HATCH. That's why I went through that because I wasn't as articulate as you have been, but since you are here, I think I can make it more clear.

Once that burden of production occurs on that specific item that the plaintiff complained about, then the plaintiff must show that that practice was unreasonable.

Mr. FRIED. That's what the *Wards Cove* decision says. And this bill would change that as well.

I think that is something which reasonable people could differ.

Senator HATCH. Sure. But more importantly, that was the standard before *Wards Cove* as well as after.

Mr. FRIED. I think it was, but once again there was confusion in the lower courts and once again *Wards Cove* did not change the law, did not overrule *Griggs*, it focused it and clarified it where there was confusion before.

Senator HATCH. But only confusion in the sense of whether the standard was job-related or manifestly related or some other similar fairly insubstantial standard.

Mr. FRIED. Well, there were hundreds of cases down there, and I think they said all kinds of things.

Senator HATCH. Sure. That's right. But basically your opinion is that *Wards Cove* did not overrule *Griggs* nor did it make a major change in the law.

Mr. FRIED. No, it did not. But this would make a very major change.

Senator HATCH. This would. And that's my point.

Mr. FRIED. In those two respects. And those are the two respects which I put my money on. I wouldn't get excited about the others.

Senator HATCH. I agree with that, and that's why I have filed the bill to take care of the *Runyon* v. *McCreary* problem, *Patterson* v. *McLean*, if you will, and the *Lorance* case problem. And I am not so sure that you are wrong in the other case, the *Price Waterhouse* case.

Mr. FRIED. Yes. Well, it's interesting, in *Price Waterhouse*——

Senator HATCH. I am going to look at your position there.

Mr. FRIED [continuing.] As in *Patterson*, the U.S. Supreme Court was to the right of me, and that was an interesting experience. [Laughter.]

Senator HATCH. Well, I am certainly going to look at that because I would like to have a bill that resolves these problems and gives the Court guidance as to what Congress really wants in this area.

Mr. FRIED. Yes.

Senator HATCH. But you and I are touching the part of this bill. There are other parts that I think are objectionable, but nothing as serious as this particular new standard. And you agree it is a new standard.

Mr. FRIED. The way I would put it is it doesn't too much matter what you say about how heavy the employer's burden is, just make

it a burden which is clear and specific and not just this amorphous endless list, and that it is reasonableness, not "essential," which really that is an enormous innovation and very serious.

Senator HATCH. In the law that is a very important word, and that did not exist prior to *Wards Cove*.

Mr. FRIED. I don't believe so.

Senator HATCH. All right. Now, you indicated that if this law passes in its present wording, including the definition of business necessity a meaning essential to effective job performance, that employers are just going to have to protect themselves and hire on a proportional or quota basis.

Mr. FRIED. Well, I believe that common sense would do that, because how are they going to defend themselves? Plaintiffs' lawyers are very aggressive. They come in, they show the numbers are wrong, and they can point to an endless list of practices, and there is no defense.

Senator HATCH. But what if they cannot hire by quotas? What if they cannot hire by proportionality?

Mr. FRIED. Because the people aren't out there?

Senator HATCH. That's right. They're not trained or they don't have the background or they can't help the business. It seems to me that they have to hire enough people that may not be helping the business or helping the job, the purposes of the business that would cause the business to be economically unsound, or they can't hire the people they really need to make the business a good, going business.

Mr. FRIED. Well, the thing that troubles me is that by talking about essentiality, you are telling every business, nonprofit organization, school, museum, hospital, that the Courts will decide what the essential way to run their business is.

Senator HATCH. That's right.

Mr. FRIED. Not they. And I think that is very serious. That is a very serious intrusion.

Senator HATCH. But you also would be providing very serious problems. Let's take MIT, your example there. MIT prides itself on having the finest minds in the fields of engineering and other related scientific areas. If they had to hire on a proportionality basis or on a quota basis, could MIT continue the standards it would like to continue? It may be able to, but I don't know.

Mr. FRIED. Well, that is a question I would think would have been better put to Secretary Marshall because I don't consider myself an expert in labor pool economics.

Senator HATCH. But you can see the problem.

Mr. FRIED. But I think it's a real problem, yes.

Senator HATCH. The problems. That is all I am doing is raising the problem here. And what I am suggesting to my good friend from Massachusetts and the others who were so supportive of this bill is that if we can get reasonability into this bill, I will support it. If we can bring reasonable legal concepts into it, I will support it. I want to do what is right for minorities in this country and women in this country, and, frankly, for everybody. I really want to do what's right for small business in this country, too, and this bill could have a devastating impact with that one standard on small as well as large business in this country.

Would you disagree with that statement?

Mr. FRIED. Well, reasonableness and specificity, the causation and the reasonableness requirements, those are the two that I think cause the difficulties.

Senator HATCH. Well, I have a lot of other questions. I think what I will do is submit them to you in writing, if I may. I know that Mrs. Patterson has been waiting a long time, and I have to apologize to her because I have to leave.

But we are going to take care of that problem, and I think everybody will be in agreement with taking care of that problem, and I think the distinguished former solicitor general, dear friend of all of ours, has made a good case for that as well.

So you will have to forgive me for leaving, but I want to thank you for your testimony because I think it is very enlightened testimony. And I think it made the case much better than I could make it. And it is an important case.

I don't want to ignore the fact that there are other aspects of this bill that are not good, that we ought to refine, that we ought to change. But that certainly is one of the key, significant, difficult—in the future it would be almost a reprehensible—part of this bill.

The CHAIRMAN. Professor Fried, in your brief you point out the Courts' decisions have used different formulations of the substantive standard governing the first stage of the inquiry into business justification that is required once a plaintiff makes out a prima facie case. And you reference, even in your own brief, "essential to good job performance," *Griggs*. And then also, "business necessity," and "manifest relationship to the employment."

So, just in terms of the nature of this discussion, these are not just phrases that are pulled out of thin air. I mean, you were obviously well familiar with them and quoted them as being part of the law at the time.

Mr. FRIED. Senator, the phrase "essential" I think occurs in that one case, the *Dothard* case, and it comes as a paraphrase of the defendant's own defense for himself. It is not adopted as a standard for the Court. The standard which the Court has been using regularly has been something like "business necessity," something like "manifest job-relatedness," "reasonableness," something of that sort.

But "essential," particularly if it appears in a new statute with that spotlight on it, means, I take it, what it says, and that means you must show there is no other way you can do your business except with this requirement. That is awfully stiff.

The CHAIRMAN. Well, the only point I mention is you used it yourself in your brief.

Mr. FRIED. Oh, I referred to it. I quoted it because it's there. It's there in the *Dothard* case.

The CHAIRMAN. Now, just further on, you had as Justice Blackmun explained in a concurring opinion in the *Watson*, many of the court's decisions in disparate impact cases, use language that can be, and often has been, read to mean that the employer assumes the burden of persuasion.

Do you accept that as a requirement?

Mr. FRIED. This is what I have been saying, in my colloquy with Senator Hatch, is that there is a certain amount of uncertainty about that, and I don't think that once the employer's burden of production, which we all agree he has, once the employer's burden of production is defined in a reasonable way, one which he can really meet, I don't think it makes a whole lot of difference whether he also has the burden of persuasion. Remember this is not to a jury; these cases are all tried to a judge.

So I can't get excited about that point.

The CHAIRMAN. Well, if it is in there, if we get the other aspects of exactly those words worked out, that doesn't trouble you then?

Mr. FRIED. Well, that, it troubles my friend Senator Hatch, and I have a lot of respect for his judgment. But I am your witness, not his advocate, so I must tell you the truth.

The CHAIRMAN. Well, I am your friend, too.

Mr. FRIED. I must tell you the truth, and the truth is that I can't get too excited about that.

The CHAIRMAN. OK.

Mr. FRIED. Once the burden is a burden which is specific and reasonable, that is what I care about.

The CHAIRMAN. The only point that I would mention here is what has been provided to us by Secretary Coleman, even when you had the old test, business necessity, we all wrestled around with that, there were scores of cases where the plaintiff wasn't able to meet that test. The way it's been presented, and perhaps I have been missing something, it would almost appear that once you are able to show the figures and statistics, bang, you're already back deep into the board room on it.

And I think Secretary Coleman supplied the series of cases in which it was extremely difficult, under the *Griggs* decision, to be able to meet that requirement. An awful lot of cases were dropped. And I think it is just important to have that in the back of our minds as well, because it almost would appear that there is a setting in motion a series of triggers, that once you start that trigger moving in terms of some mathematical kind of formula, it's going to result in some injustice.

I don't know if you would want to make any comment.

Mr. FRIED. Well, the only comment is that I agree with Secretary Coleman that, under *Griggs*, just showing that the numbers were wrong wouldn't get you your lawsuit. But I fear that under your bill it might very well do that. That is what concerns me.

The CHAIRMAN. All right. Well, our intention is just to restore.

Mr. FRIED. I understand. But I am applying an effects test to you.

The CHAIRMAN. OK. But we would certainly welcome your suggestions, recommendations, or word changes that you think would just restore. Maybe you have something on what you think it should be, or not, or whatever. But if you did have, we could call on you to help us on that.

Mr. FRIED. What I would suggest is very simple; and that is, not to insist on the causation change and not to insist on the essentiality change. That seems to me would draw very dangerous fangs from the thing, in my view.

The CHAIRMAN. Well, the causation aspects were taken right out of your brief. But nevertheless it is going to be a long, continuing

process, and obviously you have given a lot of thought to it, and we value your guidance, and we want to work with you. These are complex and difficult, but enormously important questions.

Mr. FRIED. Senator, I wanted to ask, and if the schedule doesn't permit, whether you had any inquiry you wanted to make of me, or any comment you would like from me, on the *Martin* v. *Wilks* matter because I do have some views on that as well.

The CHAIRMAN. Fine.

We have Brenda Patterson, our next witness. I would like to get into that, Professor. Could I inquire of you and have those submitted for the record?

Mr. FRIED. Certainly, Senator.

The CHAIRMAN. Thank you very much.

Mr. FRIED. Thank you very much for your time.

[Questions from Senator Kennedy, Senator Hatch, and Senator Jeffords, to Mr. Fried follow:]

WRITTEN QUESTIONS FOR PROFESSOR MR. FRIED FROM SENATOR KENNEDY

Professor Fried, I want to ask your views regarding section 5 of S. 2104, which responds to the U.S. Supreme Court's decision last year in the case of *Price Waterhouse* v. *Hopkins*. Under section 5, if a victim can demonstrate that prejudice was actually a motivating factor for an employment decision—a firing, for example—the employer has violated the law. Where the employer can show that it would have fired the employee anyway for nondiscriminatory reasons, however, the victim cannot obtain an order putting him or her back on the job. But the court can issue an injunction against discriminatory conduct recurring in the future.

The bill makes clear that the employee must show that prejudice actually motivated the employment decision, though it need not be the only cause for the decision. The bill also makes clear, however, that the employee is not to receive the benefits of a job to which he or she is not otherwise entitled.

The provision essentially adopts the position taken by in your brief on behalf of the United States in *Price Waterhouse* itself. That brief recognized that Title VII may be violated by an employment decision motivated in part by discrimination even if the employer can show that it would have taken the same action regardless of the discrimination.

"[A]n illegal motive is a 'cause' for a given outcome if the motive was sufficient by itself to produce the outcome, or if it was a necessary element in any set of factors that together was sufficient to produce the outcome. This is not the same as 'but for' causation, because *an illegal motive can be a cause for an outcome even if a legitimate motive or a set of legitimate motives was also sufficient to produce the outcome.*" (citations omitted) [p. 13]

Your brief also recognized that some relief is appropriate when a plaintiff demonstrates that discrimination affected an employment decision.

"[I]t is proper to place the burden on the defendant to prove that a given employment decision would have been the same in a discrimination-free environment. If the defendant makes such a showing, the plaintiff is made whole by an award of attorney's fees and an injunction against future discrimination. In effect, the defendant is ordered to cease the discriminatory activity, which enhances the plaintiff's employment opportunities in the future. But the defendant need not hire, reinstate, promote or provide backpay to the plaintiff, because such relief would place an employee in a better position as a result of the defendant's discriminatory-conduct than he would have occupied had the defendant done nothing." [p. 23]

My questions for you are: What are your views about section 5 of S. 2104? Do you believe he provision is consistent with your brief in the *Price Waterhouse* case?

QUESTIONS FROM SENATOR HATCH FOR PROFESSOR MR. FRIED

What impact does section 13 of S. 2104 have on your concern that this bill will lead to quota hiring by employers?

QUESTIONS FROM SENATOR JEFFORDS FOR THE MR. FRIED

Regarding Wards Cove [Sections 3 & 4]

1. How would removal of the subsection defining business necessity affect your criticism of these sections?

2. Would your opinion be different if the definition of business necessity is changed to any of the following? (Please respond to each):

a. Having a manifest relationship to the employment in question?;

b. Having a tight fit between the challenged criterion and the actual demands of the job?;

c. Demonstrably a reasonable measure of job performance?

3. Other than your problem with the definition of business necessity, do you have any objection to Sec. (k)(1)(A) [which states that a violation is established when disparate impact is shown and respondent fails to demonstrate business necessity]?

4. Are you aware of any cases in which plaintiffs alleged disparate impact on the basis of a group of practices? Please provide the Committee with case names and citations.

—In any of these cases was the separate identification of the impact of each practice a factor in the court's decision?; in which cases and in what manner?

5. During your testimony before the Committee, you responded to an inquiry regarding section 4 of the Bill that would allow plaintiffs to attack a group of employer practices without specifying the disparate impact of each practice. In your response, you allowed that where it is not possible for the plaintiff to separate the practices (*e.g.*, an integrated or closed system) it would be appropriate to lump the practices together for litigation purposes. Please expand upon your views on this issue and provide examples of the types of practices or systems which you consider appropriate for this type of treatment.

Regarding *Martin* v. *Wilks* [Section 6]

6. Since you reject the formulation proposed by Sec. 6, can you envision any way of providing for finality in litigated or consent judgments which you would not reject for the same reasons?

a. If so, please explain.

b. Do you reject finality of such judgments as a worthwhile objective?

7. Isn't it obvious that there is no point to executing orders or decrees which aid the hiring or promotion of minorities and women if every time an employment decision is made pursuant to such an order or decree that action is subject to third party litigation?

8. Can you envision any permissible exceptions to the mandatory joinder of all potentially affected persons [the standard the court set out in Wilks]?

a. What about persons not yet in the job market (e.q., under age, still in school, etc.) who later become employed by or seek positions with an employer subject to a decree. If they are not hired or promoted when a minority or woman is should they have the right to relitigate the validity of the decree?

b. Would such persons be subject to joinder at the time the decree is executed?

c. How would they be identified and/or located?

In fact, it would never be possible to join every person who potentially could be affected during the life of a decree, would it?

Regarding *Price Waterhouse* [Section 5]

9. Please share with the Committee your views regarding the appropriateness of the Court's holding in *Price Waterhouse* v. *Hopkins*. Do you have any recommendations regarding the appropriate resolution of "mixed-motive" cases?

March 21, 1990.

Senator EDWARD M. KENNEDY, *Chairman*
United States Senate
Committee on Labor and Human Resources
Washington, DC 20510–6300

DEAR SENATOR KENNEDY, I greatly appreciate your Committee's seeking my further views on this important, but seriously flawed, proposal for legislation. I would also like to take this occasion to thank you for the courtesy and consideration you showed me when I appeared before the Committee.

Responding to your question on section 5, which relates to the *Price-Waterhouse* case, I find myself nodding in agreement as I reread in your question to me the words you quote from the brief I signed as Solicitor General. The standard we proposed in that brief for these mixed motive cases is drawn from what I consider the most thoughtful analysis of causation in the law of torts generally, Professors Hart & Honore's *Causation in the Law*. I regret that the Court did not adopt our proposal.

Section 5 differs in wording from our proposal. If the intention of the section is to accomplish what I have just described (as your question suggests it is), then I think that the section should be altered to reflect what I believe is a more precise standard: the plaintiff must show, as our brief states, that the wrongful motive, standing alone or in combination with other elements shown to be present, would have been sufficient to bring about the discriminatory outcome. The point of this proposal was to make clear that where the discriminatory outcome was overdetermined—i.e., bad reasons as well as good would have been sufficient to bring it about—the employer cannot for that reason escape liability. By contrast section 5 of the Bill requires only that the wrongful motive was " a motivating factor". It seems to me that is a good bit looser than what we proposed, and would allow liability wherever a discriminatory motive came into the picture at all, no matter how marginal or insubstantial or causally irrelevant it might have been. In a large organization it might be possible to excavate some trace of bigotry somewhere in the process, but I think more than this should be required to hold the organization guilty of discrimination.

But I have another concern. In our brief we argued that if the employer can meet the shifted burden of proving that he would have taken the adverse employment action anyway, then the plaintiff should not get the job nor backpay, although (as in the labor laws) the employer might be liable for attorney's fees and might be ordered to cease any use of the improper factor in the future and possibly to take such remedial action as posting notices. All this is set out in the language from our brief that you quote in your question. Unfortunately the Bill goes further, by reason of section 8. Section 8 speaks—somewhat misleadingly, I am afraid—of compensatory damages. In fact, however, section 8 clearly goes beyond existing Title VII law by allowing damages other than backpay—which is, of course, the clearest example of truly compensatory damages. By allowing unspecified further damages (pain and suffering? emotional harm?) Section 8 disturbs the appropriate balance between Title VII actions and other actions—under section 1981, for instance, and under state tort law. There is little demonstrated need for this new expansion of liability, and the current difficulties you are experiencing about the inclusion of handicap discrimination under the Americans With Disabilities Act demonstrates the unforeseen and unnecessary problems raised by section 8.

Responding to Senator Hatch's question, it seems to me that section 13 does not in the least address, much less alleviate my concerns that the changes proposed by section 4 will inevitably lead to quota hiring. Section 4 relates to establishing liability in the first place and its vice is that it makes a case predicated on a statistically "unbalanced" workforce so hard to rebut that employers will be driven to balance (i.e. quota hiring) in the first place, so as to avoid litigation. This is precisely the effect Senator Hubert Humphrey, the principal proponent of Title VII, assured the Senate was not intended by the Act. Section 13, on the other hand, addresses remedies once liability has been established or agreed to, and has nothing at all to do with this concern.

Responding to Senator Jeffords' questions, simply removing the provisions dealing with business necessity would go part of the way to alleviating my concerns about the bill. The term business necessity is nowhere contained in existing legislation. It is a court creation. It is one of several alternative formulations of the business justification defense, all of which are part of the evolving common law of Title VII. I would simply leave this matter alone and allow it to remain a matter for court interpretation and elaboration. In this regard I would point out that the U.S. Supreme Court in the *Wards Cove* case interpreted the word "necessity" in business necessity in much the same way as Chief Justice Marshall in *McCulloch* v. *Maryland* (1824) interpreted the word "necessary" in the "necessary and proper" clause of Article I, Section 8, defining the powers of the Congress. He said that an exercise of that power was proper under the "necessary and proper" clause if reasonably related to one of the enumerated powers of Congress. In short: It ain't broke; don't fix it.

As to Senator Jeffords' question 3, where the case is tried to a judge sitting without a jury [1] I am not particularly bothered about shifting the burden of proof to the employer after the plaintiff has made his or her prima facie case, *if that burden is properly defined*. This what I said in my oral testimony. If the practice the employer is required to justify has been identified by the plaintiff with all the specificity the case admits of, and if the employer must do no more than show that this practice (or inseparable group of identified practices) is reasonable, then S. 2104's shifting of

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[1] Unfortunately this will not always be the case. If the plaintiff joins a disparate treatment claim with his disparate impact claim, it looks as if section 8B would have both claims tried by a jury. This is another example of the needless tinkering which this Bill includes, and certainly contradicts its stated purpose of merely restoring (a controversial version of) prior law.

the burden of persuasion to the employer is not as significant a practical concern as under the Bill as drafted. It is the combination of: *first*, k(l)(A) (the burden of proof) with *second*, the completely open-ended standard of k(B)(i) (no requirement that the plaintiff identify what is causing the bad numbers) and *third*, the redefinition of business justification in terms of essentiality which is lethal to proper employer prerogatives.

I might add that my good friend William Coleman misconceived my meaning when he quoted from the Solicitor General's *Wards Cove* brief as if to show that at an earlier time I agreed with the Bill's proposal in k(B)(i) to eliminate a causation requirement from the plaintiff's prima facie case. What the very language he quotes says is: "if the factors combine to produce a single ultimate selection decision *and it is not possible* to challenge each one". But the Bill contains no such limitation. It says flatly that in any and all circumstances, even if the challenged criteria are quite distinct and separable, the plaintiff "shall not be required to demonstrate which specific practice within the group results in such disparate impact." [2] In short, we made a reasonable concession to special and difficult circumstances. The Bill, quite without warrant, makes that exceptional case the universal rule. I believe that if the Court got a case with this exceptional difficulty for the plaintiff in it, it would take the position we urged in our brief. Nothing in *Wards Cove* argues to the contrary, and therefore no change is warranted.

To summarize my views about the provisions addressed to the *Wards Cove* case: Shifting to the employer in non-jury cases the burden of proof of justifying identified employment practices is not by itself likely to produce significant pressure for quota hiring. Relaxing the causation requirement, however, unfocusses and multiplies the employer's burdens and consequently puts on very serious pressure in that direction. And defining business justification by any standard stricter than reasonableness turns the quota screw even tighter. And the three changes together represent a kind of industrial policy through threatened litigation; they are an unwarranted and destructive interference with private sector institutions innocent of any discrimination.

As to *Martin* v. *Wilks*, I have nothing to add to the very excellent written and oral testimony of my former collaborator in the Solicitor General's Office, Mr. Glen Nager.

Respectfully,

CHARLES FRIED
Carter Professor of General Jurisprudence

The CHAIRMAN. We are delighted to have our final witness, Brenda Patterson, from Salem, NC. Ms. Patterson was the plaintiff in the *Patterson* v. *McLean Credit Union* case. We are honored that she has come up from North Carolina to be with us today.

You have been extremely patient with us, but we very much value your presence here today, and thank you for making the trip. We hope you will be as relaxed as you can. We are very appreciative of your willingness to share the experience with us. We are delighted to hear from you.

STATEMENT OF BRENDA PATTERSON, WINSTON-SALEM, NC

Ms. PATTERSON. Thank you, Senator. I appreciate your having me here to give my statement. And at this time I am very nervous, so I will read my statement.

The CHAIRMAN. All right.

Ms. PATTERSON. And I also want to introduce my husband, Marshall.

The CHAIRMAN. Marshall, we are delighted to have you as well.

Ms. PATTERSON. My name is Brenda Patterson. I am from Winston-Salem, NC. From 1972 to 1982, I worked at McLean Credit Union, and throughout that time I was treated much worse than

[2] Needless to say, it is part of the plaintiff's burden to show that these combined elements are indeed inseparable.

white employees. I was humiliated and insulted by racist comments. I was never promoted and never paid what white employees were paid. And in the end, I was laid off while white employees with less seniority kept their jobs.

These things happened to me because I am black. I went to court because I thought this was wrong, and my case went all the way to the U.S. Supreme Court.

Last June, the U.S. Supreme Court said I did not have a case, and all my claims have now been dismissed.

It has been 18 years since I started working for McLean, and I have nothing to show for it.

I would like to describe just a few examples from my case so you can see why the law should prohibit the things that happened to me.

McLean Credit Union is an office that provides savings and loan services for employees of McLean Trucking Company. When I started in 1972, I was the only black employee in the entire office. During the interview before I was hired, I was told by the president of the credit union, Robert Stevenson, that I was going to be working with all white women and they would probably not like me because they were not used to working with blacks.

As I quickly found out, it was Mr. Stevenson and his managers instead of my coworkers who did not like blacks.

I was a college graduate, which many of my white coworkers were not, and although I accepted an entry-level file clerk job, I made it clear I was interested in advancing to higher-level positions in the office.

I started doing primarily filing work and for 10 years I was not promoted once. Secretaries and accounting clerks were above me, and these were jobs I could have performed easily. I was actually told to dust and sweep the office, even though we had a janitor every day and no white employees were ever told to do this.

The president always assigned more and more filing work to me, and there were times when I was responsible for 20 different filing jobs in the office, such as filing new loans, pulling paid loans, typing and mailing cancellation letters, filing microfilmed checks, filing daily IBM branch sheets, shredding canceled checks, and so forth.

I was even told to do filing for the secretaries, which they were responsible for themselves. But no one was ever assigned to help me in the same way.

Unlike the white workers, when I came back from vacation, none of my work had been done, and I had to catch up everything. Even my supervisor did a formal review and found that I had too much work to do. He told Stevenson about it, but rather than promoting me for doing the work, the president just gave me more work to do and told me several times that blacks are known to work slower than whites by nature.

I was humiliated. I was nervous all the time. I lost sleep. I worried and dreamed about work and completing jobs. I cried constantly. I felt like I was being used by the credit union and being harassed and downgraded.

It was well known that Mr. Stevenson, who made all the important decisions in the company, was hostile toward blacks. One time,

a supervisor recommended a black friend for the position of computer operator. And after meeting the applicant, Stevenson told the supervisor, "Why in the hell didn't you tell me he was black?"

When the supervisor said he did not think it mattered, Stevenson said, "Well, it does. We don't need any more problems around here. We will interview this person, but we will not hire him. We will search for additional people who are not black."

A least-qualified white was hired for the position.

During the 32 years that Stevenson worked at McLean Credit Union, there were a total of only three black workers, and all were given filing jobs.

This racial hostility affected my job in every way. Mr. Stevenson frequently stood near my desk and simply stared at me for several minutes at a time. He never did this to the white workers. When white workers made mistakes, he would say at staff meetings, "This mistake was made." But when I made a mistake, he would tell the whole staff, "Brenda made this mistake," even though I had been told about it before the staff meeting.

I was never promoted in 10 years, but white workers with less education, less seniority, and less experience than I had were routinely promoted and hired into secretary and bookkeeping positions above me.

One time, a white woman with less experience and qualifications than I had was given on-the-job training and promoted to an accounting position, even though her supervisor rated her work below average since she did not grasp accounting functions and stated she was more interested in crocheting and reading magazines than doing her work.

I was denied pay increases that were given automatically to white employees. One time this happened, they said it was because of my attitude problem. But only a month before this increase was denied, my annual evaluation said, "Actually goes out of her way to be pleasant with everyone."

That same year, 1982, I was laid off, even though white employees with less seniority were retained. I am not a lawyer. I do not pretend to understand the technicalities of the U.S. Supreme Court decisions in this case. But I always believed that if a black man or woman was mistreated because of race, we could go to the Federal court house and justice will be done.

I do not expect that you are going to decide my case or make the credit union pay me damages. All I want is a chance to tell my story to a jury and to have it decided fair and square, not on a bunch of technicalities but on whether Mr. Stevenson discriminated against me. I do not think that is too much to ask.

The CHAIRMAN. Well, thank you very much. That is an enormously tragic story. I think that that thing happens in this country has to make all of us feel a sense of shame that that kind of condition exists in our society. Tragically it does in too many instances, and, hopefully, at least we will be able, with this legislation, to try to address that kind of situation.

Tell me, after you had worked 10 years and endured that kind of real harassment and bigotry, how did you feel when the U.S. Supreme Court told you that the law didn't apply to protect you?

Ms. PATTERSON. I was very disappointed and hurt because after what I went through and suffered, even I couldn't go to the U.S. Supreme Court or go to any court and be satisfied that I could get help. And that was the only place I knew where I could go was to the courts.

The CHAIRMAN. There are people—lawyers, professors—that say that the result of that decision wasn't really a setback of civil rights. What do you say to them?

Ms. PATTERSON. It is a setback because they are using my case now as an example, and many cases, discrimination cases, have been lost because of what they've done to me, and if we can't go to court to get satisfaction, where can we go?

The CHAIRMAN. Do you think it sends a message one way or another to employers that they don't have to be sensitive to these kinds of issues?

Ms. PATTERSON. Yes, it sends a very negative message to them.

The CHAIRMAN. And what do you think that message is?

Ms. PATTERSON. The message is that, "We can do anything or treat minorities and blacks any kind of way because we see now that the courts are not going to do anything about it and we have the right to treat them as they did back in slavery times."

The CHAIRMAN. That is wrong. It certainly is.

Well, the best way that we can express our appreciation to you for coming up here is to pass this legislation, and we are going to do everything we can to do it right away.

Ms. PATTERSON. Thank you.

The CHAIRMAN. And we share the sense of indignity and sadness which you have endured, but we also share enormous admiration for you for staying with this despite all of these difficulties and for your willingness to come up here.

I can't believe that the American people who have heard that very simple and eloquent and tragic statement, that they wouldn't demand that this be done virtually immediately. We will do everything we can, and I believe we are going to be successful, and when we are, an important part of the credit will be yours.

Ms. PATTERSON. Thank you, Senator.

[Additional statements and material submitted for the record follow:]

PREPARED STATEMENT OF THE AMERICAN JEWISH COMMITTEE, MR. COMAY, PRESIDENT

The American Jewish Committee is proud to be one among many supporters of S. 2104. We are united in our goal to end the racial, religious, ethnic and gender discrimination which impairs this country's ability to guarantee to all its citizens the fairness envisioned in the Constitution.

The Civil Rights Act of 1990 presents Congress with the opportunity to begin to rectify and respond to several egregious decisions handed down by the U.S. Supreme Court during its 1988–89 term. These decisions have weakened Arnerica's fair employment laws, thereby making it more difficult for Americans to seek legal redress against unfair treatment at work. By passing this bill, Congress will send the important signal that justice must not be denied, that this country will neither tolerate nor support employment discrimination and that in fact, for the ethical, moral and economic well-being of this nation, such discrimination must not be allowed. I am pleased and honored to affirm this very important message.

Before I review the specifics of the legislation there are two points I wish to make, one for each of the hats I wear. First, I submit this testimony as a senior executive of a business which employs some 600 people. I know what running a business, meeting a payroll, supervising employees and being accountable to shareholders are

all about. I believe that there is no reason why American business should not support this bill. In fact, it is in the interest of American business to strongly support this measure. The business community has and will benefit from equal employment opportunity because a society and government which supports such a goal will be the stronger for it.

Future trends support this position. Studies indicate that by the year 2000, 50 percent of new job applicants will be women and racial or ethnic minorities. If the United States is to compete in an increasingly competitive and interdependent world, we need a strong, motivated and productive labor force, not one which is hobbled by the shackles of employment discrimination. The Civil Rights Act of 1990 would help return to employees the right they held, before recent U.S. Supreme Court decisions, to seek relief from on-the-job discrimination. The Civil Rights Act also would help guarantee that employees would receive an equal opportunity to succeed in their jobs and would also help them to better protect themselves from invidious attack.

I also submit this testimony as President of the American Jewish Committee, a national organization committed to the promotion of human rights in the United States and around the world. Founded in 1906, the AJC is the pioneer human relations agency in the U.S.

As a major part of our work, we have a long and proud history of striving for equal opportunity for all people in our pluralistic society. For example, as in many other civil rights cases, the AJC filed an *amicus* brief in *Brown* v. *Board of Education*. In fact, in the U.S. Supreme Court's historic decision in *Brown*, AJC-sponsored research was cited to prove the destructive effects of segregation and prejudice on the development of children. AJC also has been active in Congressional battles in support of civil rights legislation. We strongly endorsed and advocated for several bills including the Civil Rights Act of 1964, the Voting Rights Act of 1965, and more recently, the Civil Rights Restoration Act of 1987 and the Americans with Disabilities Act, the latter of which passed the Senate and is now in the House. We also are a founding member of the Leadership Conference on Civil Rights.

As part of AJC's commitment to civil rights, we strongly believe that affirmative action is at times both appropriate and necessary to remedy past wrongs and to ensure that the disadvantaged have a full and fair opportunity to become part of mainstream society. We believe these purposes can be served by reasonable goals and timetables—in contrast to rigid quotas, which we oppose because we believe that quotas undermine the concept of individual merit and the principle of equal opportunity itself On the other hand, goals and timetables are effective—and often necessary—tools to measure and ensure the effectiveness of an affirmative action program.

I want to emphasize the fact that nothing in the Civil Rights Act of 1990 creates or condones the institution of quotas. Fairly read, the bill is not even about reasonable goals and timetables. Instead, it focuses on providing remedies for discrimination and assurances that stumbling blocks will not be placed in the path of those who are its victims. As an agency firmly opposed to quotas, the AJC does not hesitate in fully and enthusiastically supporting the Civil Rights Act of 1990.

Before I turn to the specifics of the legislation, I want to emphasize that behind these specifics, behind the somewhat dry legalisms in the bill that address the need to restore and strengthen civil rights protections, are people: People whose lives will be, and already have been, dramatically impacted by the weakening of laws against employment discrimination. And this says nothing about the well-being of America which benefits from a strong pluralistic society based on equal opportunity for all.

What does the Civil Rights Act of 1990 seek to accomplish? It:

—Protects Americans against race discrimination on the job and in private contracts;
—Restores the burden of proof in disparate impact cases;
—Facilitates prompt and orderly challenges to consent decrees and court orders;
—Clarifies that job bias is always illegal;
—Grants women and religious and ethnic minorities the right to recover damages for intentional employment discrimination now available to racial minorities;
—Corrects the statute of limitations;
—Restores fair and effective civil rights enforcement; and
—Reaffirms generous rules of construction in civil rights cases.

Perhaps as important as any provision in the bill is the section which directs that civil rights laws be construed so as to achieve their purpose of eliminating discrimination and effectuating remedies. That section asserts, in essence, the message of the entire bill—that civil rights laws should be read generously and expansively, so

as to end discrimination in this country. Once passed, the purpose of the Act will be clear: Congress intends to, and will, act forcefully when the U.S. Supreme Court interprets legislation that would make it more, rather than less, difficult for victims of discrimination to seek and obtain relief In light of the dismal record of the U.S. Supreme Court's last term, we consider this provision in many ways to be the cornerstone of the Act.

The Civil Rights Act of 1990 provides, as well, a necessary correction to the U.S. Supreme Court's recent restrictive reading, in *Patterson* v. *McLean Credit Union Co.*, of the Civil Rights Act of 1866. That latter Act, as you know, prohibits racial discrimination in the making and enforcing of contracts. The new Act will make clear that the 1866 legislation is intended to prohibit racial discrimination in the carrying out of a contractual relationship, such as the discriminatory denial of job privileges or racial harassment on the job.

Further, the Act allows a plaintiff to prove employment discrimination in a Title VII case by demonstrating that a facially nondiscriminatory employment practice results in "disparate impact on the basis of race, color, religion, sex or national origin." The plaintiff loses, however, if the employer demonstrates that the challenged practices are a "business necessity," that is, essential to effective job performance. This section of the Act is intended to undo the consequences of *Wards Cove Packing Company, Inc.* v. *Atonio*, in which the Court placed the burden on the plaintiff of proving both disparate impact and lack of business necessity.

Contrary to what some will argue, providing remedies for unjustified employment practices which result in disparate impact has *nothing whatsoever* to do with quotas. Title VII, as it was interpreted prior to *Wards Cove*, in the light of the U.S. Supreme Court's 1971 unanimous decision in *Griggs* v. *Duke Power Company*, and as it will be again interpreted once the bill before us becomes law, did not require that employers adopt immutable percentages for minorities and women in the workforce. Rather, it required only that, upon a showing of disparate impact, employers demonstrate the business necessity for the practices leading to that impact. It is obvious to me, as an employer, that the burden of proof as to that business necessity should rest on the employer. An employer is far better placed to show the need for those standards than an employee is to show that there is no such need.

Moving on, the Act protects consent decrees or judgments established through bargaining or under court order, which remedy claims of employment discrimination, whether by a program of affirmative action or otherwise. Typically, such so-called "collateral" actions arise when white employees or would-be employees challenge a remedial preferential program created by a consent decree in the settlement of a suit by black plaintiffs against an employer. In *Martin* v. *Wilks*, the U.S. Supreme Court held that white fire fighters could bring such a new lawsuit in order to attack the eight year old settlement of a Title VII action against Birmingham, Alabama. As a result, employers are greatly dissuaded from settling discrimination cases because the settlement is never closed to later challenges by nonparties. Under the Act, stability will be restored to current decrees settling Title VII cases, as those decrees, once final, will be subject to challenge only in a limited number of cases. Business welcomes such finality. Let me also note that this section, more than heretofore, establishes the procedures under which a nonparty will be entitled to be heard as to the merits of a proposed judgment or decree before it is rendered or instituted.

The Act also allows employees to bring a Title VII challenge to employment practices, including most labor agreements, at such time as they are adversely affected by those practices. This is intended to remedy the Court's holding in *Lorance* v. *AT&T Technologies, Inc.*, which calculated the time within which a challenge to an agreement must be brought from the time of initial entry into the challenged plan or agreement.

Moreover, the Act explicitly provides for monetary damages under Title VII when a plaintiff proves intentional employment discrimination. This section is intended, in part, to allow assessment of damages for discrimination, even when a plaintiff would not be entitled to the already-available remedy of back pay, because discrimination was only one of several factors in a challenged job decision. This section of the Act provides a remedy to the Court's decision in *Price Waterhouse* v. *Hopkins*, which seems to allow an employee no recourse when discrimination, while implicated in an employment decision, is only one of several factors.

In some additional provisions, the Act generally allows for punitive damages where it can be shown that the discrimination is motivated by malice. The Act also allows a plaintiff to recover interest on a judgment against the government on the same terms as interest may be obtained from a private party.

Finally, the Act, dealing with issues raised by the *Zipes* and *Jeff. D.* cases, does much to ensure that a victim of discrimination will continue to be able to recover from the defendant attorney's fees expended by the victim in vindicating his rights. Thus, with respect to the former case, the courts will be afforded the discretion to award attorneys' fees as against the original defendant in a case where the plaintiff must defend a successful result from attack by third parties. As to *Jeff. D.*, the Act makes it more difficult for a defendant to require, as a condition of settlement, that plaintiffs waive their right to attorney's fees. These last provisions do much to reverse rulings which have undoubtedly deterred attorneys from bringing meritorious actions on behalf of victims of discrimination.

Taken together, the provisions of the Civil Rights Act of 1990 will restore and strengthen civil rights practices. It is a necessary and appropriate response to the adverse U.S. Supreme Court decisions of the 1988–89 term. The Act will make employment discrimination suits easier to bring and less subject to challenge than under the current state of law after the Court's rulings.

The Civil Rights Act of 1990 is essential to achieve the goal of a discrimination-free workplace. As such, the American Jewish Committee strongly endorses this legislation.

The CHAIRMAN. The committee stands in recess.

[Whereupon, at 1:00 p.m., the committee was adjourned.]

CIVIL RIGHTS ACT OF 1990

TUESDAY, FEBRUARY 27, 1990

U.S. SENATE,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC.

The committee met, pursuant to notice, at 9 a.m., in room SD-430, Dirksen Senate Office Building, Senator Edward M. Kennedy (chairman of the committee) presiding.

Present: Senators Kennedy, Metzenbaum, Simon, Hatch, Jeffords, and Thurmond.

OPENING STATEMENT OF SENATOR KENNEDY

The CHAIRMAN. We will come to order.

We have a very distinguished group of witnesses today. Today is somewhat complicated for Senator Hatch and myself since the Senate is now debating the voluntary service bill on the floor of the Senate. So we are going to have to absent ourselves after a reasonable period in the course of the hearing, and at the outset we want to apologize to some of the witnesses. We have other members of the committee who are deeply interested in this issue and who will preside over the hearing. But I know I will take great interest in all of the testimonies we will be receiving.

But we wanted to move the hearing up to try to accommodate both the witnesses and the Senate schedule. We appreciate the understanding of the witnesses on this particular conflict.

This is the second in a series of four hearings by the Committee on Labor and Human Resources on S. 2104, the Civil Rights Act of 1990. At our opening hearing last Friday we heard compelling testimony from distinguished witnesses about the overall impact of the U.S. Supreme Court's recent decisions on civil rights and about the need for legislation to restore and strengthen those rights.

Today's hearing will focus on the three major provisions in the bill dealing with intentional discrimination. First, the bill overrules the U.S. Supreme Court's decision last summer in *Patterson* v. *McLean Credit Union*, in which the Court drastically cut back on the century-old civil rights law known as section 1981. Section 1981 guarantees to all persons the same right to make and enforce contracts enjoyed by white citizens.

The U.S. Supreme Court ruled that although the section applies to hiring decisions, it does not bar discrimination on the job. As a result, for 11 million persons working for firms with fewer than 15 employees, there is no Federal ban against intentional discrimina-

tion or harassment on the job itself or in the decisions to promote or fire workers.

Our bill will restore the law's broad protection against intentional race discrimination in all aspects of employment.

Second, under section 1981 victims of intentional race discrimination on the job may recover compensatory damages and, in certain serious cases, punitive damages as well. But because of a gap in the law, employees victimized by intentional discrimination based on sex, religion, or national origin cannot obtain this important relief. As a result, victims of sexual harassment or religious prejudice often have no meaningful remedy.

Our bill will close this gap and make the same remedies available for all victims of intentional discrimination.

The third provision clarifies the law applicable to so-called mixed-motive cases. In *Price Waterhouse* v. *Hopkins* the Court ruled last year that where intentional sex discrimination was a motivating factor in an employee's failure to receive a promotion, she was not entitled to relief if her employer could demonstrate that she would have been denied promotion in any event for other nondiscriminatory reasons.

Under the bill, when an employee demonstrates that prejudice actually motivated an employment decision, the employee is entitled to relief—ordinarily, an injunction against future discriminatory conduct, and attorneys' fees. But if the employer can show that it would have made the same decision without the discriminatory motive, the employee is not entitled to reinstatement or back pay.

There are many distinguished witnesses today, and I look forward to their testimony.

Senator HATCH. Well, thank you, Mr. Chairman.

I join with the chairman of the committee in extending appreciation and welcome to all of our witnesses this morning. I am interested in hearing from all of you but especially from Mr. Donald Ayer, the deputy attorney general of the United States, several former members of the Equal Employment Opportunity Commission and, of course, others regarding this legislation.

Now, none of us will argue that discrimination does not exist today. We have all seen its ugly head and evidences of it. We need, it seems to me, strong and effective implementation of our civil rights laws. And while there is a need to improve our civil rights law enforcement, I think we have to do it right, and I intend to be a strong advocate for such improvement and enforcement.

We agree, Mr. Chairman, that some change in these laws is desirable. I have introduced legislation prepared and supported by the Bush administration to overturn the U.S. Supreme Court decisions in *Patterson* v. *McLean* and the *Lorance* cases.

But, Mr. Chairman, I cannot support wholesale changes in our essential civil rights laws when such changes, in effect, overturn many time-honored principles, principles which are dear to every American. This legislation would shift the burden of proof to defendants in disparate impact cases or in disparate impact cases, meaning that one is guilty until proven innocent. This legislation would severely limit the right of certain workers affected by a consent decree to challenge that decree in court when they claim that

they are harmed by it. This would deny Americans their equal rights to their day in court.

By introducing punitive and compensatory damages and jury trials to title VII, the legislation provides a windfall for attorneys and creates an incentive to engage in lengthy litigation rather than to settle differences.

I submit to my colleagues here in the Senate that this incentive moves our Nation no further toward the kind of society we seek, one in which irrelevant factors such as race play no role in employment decisions.

Some of the aspects of the bill which will be covered today are of particular interest, with the exception of the *Patterson* case, which we both agree warrants redress, the significant changes contained in sections 5 and 8 of this bill do not even purport to be a "restoration" of the law to where it was before the U.S. Supreme Court's 1989 term. They clearly represent a substantial departure from the Civil Rights Act of 1964.

Section 5 of this bill would overrule *Price Waterhouse* v. *Hopkins*, a plurality decision written by Justice Brennan, which was a victory for civil rights plaintiffs. This section goes further, in section 5 of this bill, it goes further than that opinion by reversing the general rule that in employment cases the plaintiff must show that the defendant's unlawful conduct caused the injury.

The change here is significant. This bill would allow punitive and compensatory damages and attorneys fees even in cases where an employer has proven that it would have made the same decision for non-discriminatory reasons.

Section 8 of this bill proposes, though not in response to any U.S. Supreme Court decision, to expand title VII to make punitive and compensatory damages, including damages for pain and suffering, available in disparate impact cases.

I am concerned that this would change title VII from a statutory scheme aimed at conciliation and administrative resolution of allegations into one in which litigation is the first, if not last, resort. To change the act in a way that would discourage rather than encourage the prompt and equitable resolution of employment disputes could, in the long run, heighten rather than lessen racial and other conflicts in the workplace.

Indeed, one provision of this bill, section 9, makes it illegal to condition settlements on the waiver of attorneys fees, thus overturning yet another U.S. Supreme Court decision in *Evans* v. *Jeff D.* This will make it even more difficult to settle cases. This will delay, not foster, simple justice.

Mr. Chairman, I reiterate that we both seek equality of opportunity in the workplace. I admire you for the work that you have done in this area through the years and have a great deal of respect for you.

Unfortunately, there are certain principles of justice which I believe would be turned on their heads if this legislation were enacted in its present form. I find it discouraging that we are being asked to overturn these fundamental rights that really have existed really of citizens in order to prove our support for equal opportunity.

Now, this is strictly an unfair exchange for everyone, in my opinion. So I intend to make sure that we do the very best we can to right the wrongs, move forward, do the things we can to end discrimination in the workplace and elsewhere, and do it in a way that is consistent with the best intentions of the law and the best workings of the law. And I hope we can do that before it is over. But I don't think this bill does that except with regard to the *Patterson* v. *McLean* and *Lorance* cases.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Senator Metzenbaum.

Senator METZENBAUM. Mr. Chairman, I commend you for moving ahead quickly with these hearings on the Civil Rights Act of 1990, and I also commend Senator Hatch for his willingness to give his attention and time to this issue. I know that he has the same good intentions as all of us do on this committee. I am hopeful that we will be able to prevail upon him about the need for enactment of the entire piece of legislation as it comes before us. I further hope that the administration will see fit to join us in supporting this most important piece of civil rights legislation.

Last Friday we heard compelling testimony from a number of distinguished witnesses on the critical need to correct the disastrous series of recent decisions by the conservative majority on the U.S. Supreme Court. This morning's hearing focuses on three specific issues, all involving intentional employment discrimination—*intentional* employment discrimination.

Many people would like to believe that employers are no longer openly racist or sexist. Unfortunately, that is not the case. Just ask Brenda Patterson. As she testified last week, she was harassed, humiliated, and insulted because her supervisor was openly hostile to blacks. When Brenda Patterson sought justice under section 1981, the U.S. Supreme Court slammed the door in her face.

The Court's new majority declared that section 1981 prohibits racial discrimination in hiring but it does not apply to racial discrimination once you are on the job. That is wrong. That is absurd. That is preposterous.

The Civil Rights Act of 1990 makes clear that section 1981 applies to employment conditions after hiring as well as to hiring decisions. Intentional discrimination against women is just as hurtful as intentional racial discrimination. But under current law, the remedies are not the same for intentional sex discrimination as they are for intentional race discrimination.

The Civil Rights Act of 1990 corrects that inconsistency. The bill applies the damages provisions of section 1981 which allow for compensatory and punitive damages to intentional employment discrimination claims under title VII. Thus, all victims of intentional discrimination in the workplace will be able to receive full and fair compensation.

The third issue involves the *Price Waterhouse* case. In that case the U.S. Supreme Court indicated that an employer could make an employment decision based on an illegal, racist, or sexist motive so long as it also relied on an independent legal reason for the decision.

But if we are truly serious about eliminating all forms of discrimination in the workplace, then we cannot allow any reliance on racist or sexist stereotypes. Therefore, the bill makes unlawful any consideration of illegal motives by employers.

I look forward to reviewing the testimony from today's witnesses. I am pleased that we are moving forward quickly on this critical legislation. I consider it the most important piece of civil rights legislation that we have had before the Congress in many a year.

The CHAIRMAN. Thank you very much, Senator Metzenbaum.

Our first witness today, the Deputy Attorney General Donald Ayer, who is testifying on behalf of the Department of Justice and the Bush administration. Before assuming his present position, Mr. Ayer was most recently the deputy solicitor general.

We are glad to have you here.

STATEMENT OF HON. DONALD B. AYER, DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. AYER. Thank you, Mr. Chairman.

The CHAIRMAN. We express our appreciation to you for getting your testimony up to us as well.

Senator HATCH. Yes. I appreciate that. I read it last night.

The CHAIRMAN. That makes it, for many of us, a more effective hearing. Thank you.

Mr. AYER. Well, we try to move as fast as we can, but we don't always move as fast as we would like.

Mr. Chairman, I am very happy to be here today to present the views of the Bush administration on the major civil rights decisions of the last term and, more specifically, with regard to S. 2104, labeled the Civil Rights Act of 1990.

It is our view that there is no more important matter than assuring the fair treatment of our citizens, which I take to mean protecting against present discrimination and also providing strong remedies for harms that are found to have occurred in the past.

We believe that the issues presented in these five or six or seven, depending how you count them, significant civil rights decisions of last term are difficult issues and that it is very important that we evaluate these decisions on their own terms as individual matters rather than as simply a pattern that can be assimilated together.

It is our view, in general, that the decisions reached by the Court, while we would change some in terms of the results and do indeed advocate legislation, as you all are aware, that nonetheless all of those decisions are well within the zone of reasonable interpretation and represent very serious and careful efforts on the part of the nine-member U.S. Supreme Court to grapple with what are, I think we all have to agree, very difficult and very important issues.

The policy issues presented by these decisions and by the pending legislation are really, I think, perhaps the clearest case one can imagine where a serious national debate of an in-depth and careful sort is appropriate, and I hope by my participation today to contribute in some small way to that debate, and I look forward to following the debate as it goes forward over the next few weeks.

From our perspective, the issues need to be approached with a couple of fundamental assumptions in mind. One of those is, I think, a principle that is so ingrained in our system and ingrained in our consciousness that it isn't articulated as often maybe as it ought to be, but it is basically the proposition that in our society people should not be judged either by the color of their skin or by certain other characteristics that are immutable and really not relevant in terms of their ability to perform a particular job.

We believe, as I am sure the Senators here today do, that that is an ideal. It has been an ideal of ours in this country for many years. It is an ideal and a goal toward which we must continue to aspire. Unfortunately, as we are again all aware, it is an ideal which has not been achieved entirely. We have made progress, but there is a great deal more work to do.

So that it is a very important part of our policies, and must continue to be, to oppose intentional discrimination and to provide remedies wherever it exists.

At the same time, I think it is important for us to note that it is our view is one of accepting the position that the U.S. Supreme Court has laid out with regard to affirmative action remedies—that is to say, race-conscious remedies—which the U.S. Supreme Court has found to be appropriate in some limited circumstances, tested by particular tests that the U.S. Supreme Court has laid out.

As I say that, I am conscious of the fact that that proposition is in some tension with the initial proposition of aspiring toward a society where intentional discrimination is completely irrelevant.

It is in tension because affirmative discrimination or affirmative action is itself a form of intentional discrimination, and I would say the saving, the saving element that reconciles those two, although leaving them in tension, are the carefully limited circumstances within which that sort of affirmative remedy has been found by the U.S. Supreme Court to be appropriate, the best and easiest-to-follow example being, I think, the U.S. Supreme Court's decision in *City of Richmond* v. *Croson*, decided last term as well, where the Court made clear that minority set-aside provisions are sometimes acceptable but only in circumstances where there has been an identified pattern, history of discrimination which has been carefully identified and focused on by those who are putting together the minority set-aside program, and then, second, where the program itself, whatever shape it may take, is carefully and narrowly tailored to meet that historic problem of past discrimination.

I think that sort of an approach of identifying the discrimination problem and then narrowly tailoring a remedy, that I think defines essentially the limits within which affirmative action or reverse discrimination or whatever phrase you want to use to describe it is appropriate in our society. It is a limited place but, I think, in some situations an important place.

Well, with those sort of basic principles as background, I want to say that the administration has done, I think, exactly what the President and the attorney general indicated it would do last summer following the U.S. Supreme Court decisions of last term; that is, it has monitored and followed the application of the U.S. Supreme Court's decisions in the Courts, district Courts, and

Courts of Appeals across the country and has thought hard, I think, about to what extent those decisions have resulted in situations where remedies for discrimination are no longer adequate, situations calling for some action by the Congress to change the laws in this country.

What we have concluded, as you all are aware, I think, is that important changes are necessary in two areas. The first is the situation posed by the U.S. Supreme Court's decision in the *Patterson* case involving section 1981, which deals with intentional racial discrimination in connection with contracting. The U.S. Supreme Court read the language of that statute, read the words "make and enforce," which are indeed the words of the statute, to mean precisely that, one might say read them narrowly in terms of their precise meanings, and I must say in that, I think, acted reasonably.

But at the same as I say they acted reasonably, I think the Court left us with a situation plainly requiring legislative change. Legislative change is required because we now are in a situation where section 1981 reaches only intentional discrimination in the entering into of contracts or in connection with the judicial or other enforcement of contracts and intentional racial discrimination involved in harassment in connection with the contract, whether it is an employment contract or some other kind of a contract; terminations, racially motivated terminations; racial motivations with regard to the terms and conditions, either making them or changing them.

None of that is covered, and we think it is important that this major civil rights post Civil War statute relating to intentional racial discrimination cover the whole gamut of the relations involving contracts.

So we favor a change which is quite close to that enunciated in S. 2104. Although the language is slightly different, I think, in substance it is essentially the same.

The other area where we favor a change is in connection with the U.S. Supreme Court's decision in *Lorance* v. *AT&T Technologies*. That case involves seniority provisions.

The specific holding there was that while the application of a facially discriminatory seniority provision will start the statute of limitations running anew because it is in fact a new violation of title VII, the Court said on the facts before it that where the seniority provision is not facially discriminatory though intentionally discriminatory both in its adoption—it was motivated for intentionally discriminatory reasons, and in application when you look at the context you see that it works a discriminatory effect—because it is not on its face obviously discriminatory, the Court said that its application is not in and of itself a violation of title VII.

The United States filed a brief in *Lorance*, taking the contrary position. The United States believes that the application of a seniority provision, whether facially or not facially discriminatory, ought to be a violation of title VII, and we are proposing legislation, again similar though not identical to that in S. 2104, which would make that change.

In four other major areas, and some minor ones, I think, though I will speak mainly to the major ones, the department and the administration are in disagreement with the proposals of S. 2104.

And I will try to go briefly through those major points and leave the minor points to questions, if there are any.

With regard to the *Wards Cove* decision, wherein S. 2104 proposes to change three aspects of the U.S. Supreme Court's decision, we believe that the proposed legislation would have the effect of putting a burden on employers such that they would realize that they would virtually never—and I only say virtually because I hesitate to say absolutely never—but virtually never be able to prevail once a case, a prima facie case showing adverse impact had been shown.

The three changes relate to the proposed legislation's requirement: First—or I should say removal of the requirement stated by the U.S. Supreme Court that a specific employment practice be identified by the plaintiff—under the proposed legislation, it is sufficient for a plaintiff to simply focus on a group of employment practices, which is defined very broadly.

Second, the proposed legislation would make clear that the burden shifts to the employer to show job-relatedness, the particular standard of job-relatedness being also changed, and that is the third element of the legislation and, I think, the most important one and the one that we have the greatest problem with, is the legislation's proposal that what the employer must now carry the burden of proving is that the employment practice is essential, not that it is job-related, not that it is in manifest relationship to the job or any of the other terms that the U.S. Supreme Court in a number of decisions over the last 15 years has utilized; rather this bill substitutes a brand-new term—that is, the concept of essentiality—which appears, to my knowledge, in only one U.S. Supreme Court decision, the *Dothard* decision, and in that case is plainly used to describe not the test—it is not a question of whether the employer's test is essential—but it is rather used to describe a particular trait. And of course, the problem was that the test failed to measure the trait.

I think if you read that carefully in *Dothard*, you will see that the references to essentiality really have nothing to do with the employer's height and weight test; they rather have to do with the question of strength. And it is, really, I think, an inept and largely irrelevant utilization of the term.

Now, in *Wards Cove*, the one point I do want to make, and I would be happy to say more about it, is that I think a fair reading of the U.S. Supreme Court's prior cases fairly completely refutes the assertion that *Wards Cove* is a major departure from prior law.

There is an argument to be made, I think, or I think it's fair to say, that reading a number of U.S. Supreme Court decisions with regard to the burden of proof issue, one could find ambiguity in those decisions. They talk in terms of burden of showing, burden of demonstrating. A variety of terms are used.

The U.S. Supreme Court itself, in the *Sweeney* decision, *Board of Regents* v. *Sweeney*, I think, in 1978 in the context of disparate treatment, described and focused on those particular instances of terminology and found that in the context of disparate treatment they were fairly read to talk about the burden of production. So I think, though there is ambiguity in the prior U.S. Supreme Court

decisions, it is a very fair reading to say the burden stays on the plaintiff.

More importantly, I think that the structure of our law, both in terms of title VII and in terms of the shifting of burdens, the burden ought to stay on the plaintiff. Two reasons why:

One is title VII made clear that the mere showing of an impact does not state a title VII violation, and if you shift the burden to the employer, you are creating a situation where indeed the mere showing of an impact does state a title VII violation.

Second, under Federal Rule of Evidence 301, it is stated that a presumption, which I think is essentially what we are dealing with when you have a prima facie case of disparate impact, a presumption does not shift the burden of proof, it shifts the burden of production. And that is quite consistent with what the U.S. Supreme Court did here.

With regard to *Martin* v. *Wilks*, we also believe that the decision was correctly decided. At issue there is a rather fundamental point in our legal system concerning a person's right to have a day in Court. And S. 2104 would create a situation where one need not even have notice of the provision when it is enough that reasonable efforts were made.

The specific three elements of S. 2104, I would be happy to talk about at greater length. But we are really dealing with a situation here where I believe that if the language of S. 2104 were adopted, we would have implemented an unconstitutional provision in violation of the due process clause.

And I guess more to the point, I think we need to think long and hard before we start doing people out of the right to go to court because their going to court is going to be disruptive of some other policy effort we are trying to make, particularly when they go to court the disruption comes from the vindication of their constitutional rights. If we are going to set aside consent decrees or other discrimination-related court orders by result of allowing collateral attack, it is going to be because those orders are found to violate fundamental rights of other people. And I think we want to be very careful about denying people their right to have a day in court to pursue those constitutional rights.

The final decision I want to focus on is *Price Waterhouse*, and I would say there quite simply that I believe this proposal would have the effect of imposing liability on employers for the simple act of having improper and impure thoughts, the reason being that the bill makes clear that the discriminatory thought need not be the cause of the injury that is asserted in the title VII action.

Finally—and this relates to an aspect of the bill which is not related to a U.S. Supreme Court decision, the basic rewrite of title VII in S. 2104—there are issues, I think, relating to the adequacy of remedies in certain situations. And those, I think, need to be focused on their merits, specifically to assure that advent remedies are adequate.

The problem with the proposal in this legislation is that it does a wholesale rewrite and remake at the conceptual level of title VII. Title VII is a piece of legislation that I think has served this country very well for 25 years. It reflected a very important compromise at the time it was enacted, and it was aimed principally at

maximizing the chances that victims of discrimination would be put back into the positions, restored to their rightful place, and the effect of discrimination could be minimized.

One of the elements of that is the mediation process that is explicit in title VII, where someone takes his case first to the EEOC or to a State mediation agency.

Another important part of it are the equitable remedies relating to back pay and reinstatement and front pay, which specifically were intended not to include compensatory and punitive damages.

What this legislation will do, in my opinion, is create a machinery of litigation that will actually, I think, impair the effect of title VII, the beneficial effect of title VII of actually putting people back in place. While it will provide some useful affirmative remedies where they may be inadequate now, in many, many other areas the remedies, I think, are quite adequate and indeed are very beneficial to plaintiffs.

And by creating a 2-year statute of limitations by apparently creating a broad provision relating to continuing violations—and frankly, I am unclear on precisely how broad the 2-year statute of limitation provision is to be read with regard to the creation of continuing violations.

So that, in effect, in many instances there may be no statute of limitations at all, and by creating the possibility for really almost endless damages to be paid and penalties to be assessed against employers, we are creating a very strong adversarial situation which I think sadly in many cases is going to hurt plaintiffs as much or more than it hurts defendants, because what plaintiffs need many times and what they often, but not always, can be given through title VII is the real chance to get their life back together and to move beyond the discrimination which they have been victimized by.

What this bill will do, I think, is to create a sort of a bonanza or a potential bonanza not only for lawyers but for also plaintiffs and, I think, change the focus of the litigation in a way that will not be good for either the parties involved or for society.

So that, I think, is a fair overview of our position on the major aspects, and I would be happy to take any questions you all may have.

[The prepared statement of Mr. Ayer follows:]

PREPARED STATEMENT OF DONALD B. AYER

Mr. Chairman, distinguished members of the Senate Committee on Labor and Human Resources:

It is an honor to appear before you today to testify regarding the U.S. Supreme Court's rulings last term involving civil rights issues, and S. 2104, entitled the Civil Rights Act of 1990. The administration has a strong commitment to the civil rights of all people. We believe that there must be strong remedies to root out discrimination wherever it may exist. Unfortunately, racism and bigotry cannot be viewed as wholly problems of the past. As the President said in his State of the Union message: "Every one of us must confront and condemn racism, anti-semitism, bigotry, and hate. Not next week, not tomorrow, but right now. Every single one of us."

We congratulate the Senate for passing, with administration backing, the Hate Crimes Statistics Act, which, once enacted, will help us to get a better picture of this problem and to focus our resources where they are most needed. In the first year of this administration, the Department of Justice indicted some 89 defendants in 56 separate cases for criminal civil rights violations. We filed or participated in

34 cases under the new Fair Housing ACt amendments, which only became effective as of March 12. And we filed a dozen employment discrimination cases. As our activities suggest, we are using vigorously the tools available to us and, for the most part, we find those tools effective.

The U.S. Supreme Court last Term issued some thirteen decisions that touched one aspect or another of civil rights law. In some of these cases, the government had urged the position adopted by the Court. In others, the Court disagreed with the government. Thereafter, the President and Attorney General both pledged last June that the administration would carefully monitor the application of these decisions in the lower courts to determine their effect on meritorious civil rights claims and respond accordingly.

We have done exactly that. Based on our own studies and comments from groups, including the NAACP Legal Defense and Education Fund, we have concluded that of the five most significant decisions, two reach results that merit legislative action. Thus, we believe that Congress should amend the law to require a different result from that reached by the U.S. Supreme Court in *Patterson* v. *McLean Credit Union*, —— U.S. ——, 109 S. Ct. 2363 (1989), and *Lorance* v. *AT&T Technologies Inc.*, —— U.S. ——, 109 S. Ct. 2261 (1989). Accordingly, the administration supports legislation that has been introduced by Senators Thurmond, Dole, Hatch and Coates (S. 2166) to address the problems created by these cases. With regard to three other cases, based on our review of how these rules have been applied,[1] we see no need for corrective action.

In supporting legislative action in some areas and opposing it in others, we are guided by a fundamental principle that grows out of our history, and is now a part of the fabric of our law: that people should not be judged or dealt with according to the color of their skin or certain other irrelevant personal traits. We take this as a common value that all decent people can agree upon. I will begin by discussing those areas where we think this principle dictates the enactment of new legislation.

In *Patterson*, *supra*, an employee brought an action pursuant to 42 U.S.C. § 1981, alleging that her employer had harassed her on the job, failed to promote her, and ultimately discharged her, all because of her race. The Court held that Section 1981 is limited by its terms to prohibiting discrimination in "mak[ing] and enforc[ing] contracts," and does not extend to "problems that may arise later from the conditions of continuing employment." *Patterson*, —— U.S. at ——, 109 S. Ct. at 2372. Thus, the Court held, the statute prohibits discrimination, whether governmental or private, in the formation of a contract, and in the right of access to a legal process that will enforce established contract obligations without regard to race. According to the Court, however, the plaintiff's allegations of harassment on the job addressed only conditions of employment and were not actionable pursuant to Section 1981.

The *amicus* brief filed by the Department of Justice, on which my name appears, argued for a somewhat broader reading of Section 1981, which would have extended its coverage to claims of harassment that would constitute a violation of state contract law. Our review of the cases applying *Patterson* over the last eight months further leads us to the conclusion that the Court's reading leaves a gap in the fabric of our civil rights laws that must be filled. We therefore support corrective legislation to ensure that section 1981 will apply to the performance, breach, and termination of contracts to the same extent that it does to their making and enforcement. At the same time, we believe that it is appropriate to codify the holding of *Runyon* v. *McCrary*, 427 U.S. 160 (1976), that section 1981 prohibits private, as well as governmental discrimination.

In *Lorance*, *supra*, female employees challenged a seniority provision pursuant to Title VII, claiming that it was adopted with an intent to discriminate against women. Although the provision treated all similarly situated employees alike, it produced demotions for plaintiffs, who claimed that the employer had adopted it with the intent to discourage women from entering a particular line of employment.

The U.S. Supreme Court held that the claim was barred under Title VII's statute of limitations, because the time for plaintiffs to file their complaint began to run when the employer adopted the allegedly discriminatory seniority system. The Court distinguished the situation where a seniority system discriminates on its face, acknowledging that in such a circumstance each application of the policy constitutes a new violation. However, where, as in the case before it, the provision is neutral on

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[1] These decisions are *Wards Cove Packing Co.* v. *Atonio*, —— U.S. ——, 109 S. Ct. 2115 (1989); *Martin* v. *Wilks*, —— U.S. ——, 109 S. Ct. 2180 (1989); and *Price Waterhouse* v. *Hopkins*, —— U.S. ——, 109 S. Ct. 1775 (1989). We also oppose any legislation aimed at *City of Richmond* v. *J.A. Croson Co.*, —— U.S. ——, 109 S. Ct. 706 (1989).

its face (although discriminatory both in purpose and effect), the Court concluded that only the initial enactment constitutes a violation.

The United States, and the EEOC, filed an *amicus* brief, on which my name appeared, supporting the plaintiffs. We argued that the plaintiffs' demotions were not merely the inevitable effects of the prior allegedly discriminatory adoption of the seniority system, but were instead direct, present applications of the seniority system, the effects of which had until then been only theoretical, and, as such, were "unlawful employment practices" that independently triggered Title VII's statute of limitations.

The rule adopted by the Court could have the result of shielding intentionally discriminatory seniority systems from attack by people who never have had an opportunity to challenge them. The discriminatory reasons for adoption of a seniority system may become apparent only when the system is finally applied to affect the employment status of the employees that it covers. Moreover, such an application surely focuses the controversy between an employer and an employee more sharply and permits more precise litigation. In addition, a rule that limits challenges to the period immediately following adoption of a seniority system will promote unnecessary and unfocused litigation. Employees will be forced to challenge the system before it has produced any concrete impact, or forever remain silent. Other employees, who are hired after the statute has run following adoption of a seniority system, will be barred from ever challenging the adverse consequences of that system, regardless how severe they may be. Such a rule fails to protect sufficiently the important interest in eliminating employment discrimination that is embodied in Title VII.

The administration therefore supports an amendment to section 706(e) of Title VII of the Civil Rights Act of 1964 that would restart the period for filing a charge each time an employee was injured by the application of a seniority system that was alleged to have been adopted with discriminatory intent.

We urge Congress to move quickly to enact these two important changes. At the same, we strongly believe that four other major changes proposed by S. 2104 should not be adopted. We are convinced that three of last Term's decisions, *Wards Cove Packing Co.* v. *Atonio*, —— U.S. ——, 109 S. Ct. 2115 (1989); *Martin* v. *Wilks*, —— U.S. ——, 109 S. Ct. 2180 (1989); and *Price Waterhouse* v. *Hopkins*, —— U.S. ——, 109 S. Ct. 1775 (1989), should be left intact.

In *Wards Cove*, the Court addressed three important issues concerning the burdens of proof in a lawsuit alleging that an employer's hiring practices have had the effect of discriminating in violation of Title VII. After reaffirming that statistics may form the basis for a prima facie case of disparate impact, and that the statistics must compare the employer's workforce to the pool of qualified job candidates, the Court addressed the issue of causation. The Court held first that a plaintiff must identify the specific employment practices that have produced the challenged disparate impact. Thereafter, the Court addressed the burdens imposed on the parties once a plaintiff has established a prima facie case of discrimination. It held that the employer's burden is to produce evidence that the "challenged practice pursues, in a significant way, the legitimate employment goals of the employer." *Wards Cove*, —— U.S. at ——, 109 S. Ct. at 2125-26. Finally, the Court held that the burden of persuasion always remains with the plaintiff, and that the plaintiff may defeat the employer's evidence by showing that reasonable alternatives would serve the employer's purpose equally well.

This seems to us to be a sensible and efficient allocation of litigation responsibilities. Asking the plaintiff to identify the specific practices that produce a disparate impact before employers are asked to justify them is consistent with traditional rules allocating burdens of proof. This allocation of responsibilities strikes us as more efficient than allowing plaintiffs simply to allege that a hiring system produces a disparate impact and forcing employers to demonstrate that each individual employment practice within that system does not have a disparate impact. In view of the liberal discovery rules and the record-keeping requirements of the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.1 *et seq.* (1988), we do not think that this requirement of specificity should unduly burden plaintiffs.

Indeed, the Court's prior "disparate impact cases have always focused on the impact of particular hiring practices on employment opportunities for minorities," *Wards Cove*, —— U.S. at ——, 109 S. Ct. at 2124, and plaintiffs have always targeted those specific practices. *See Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) (high school diploma requirement); *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977) (height and weight requirements for prison guards); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1977) (employment tests and seniority systems); *Connecticut* v. *Teal*, 457 U.S. 440

(1982) (written examination); *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977 (1988) (subjective judgment of supervisor).

In our view, the Court also correctly held that its formulation of the applicable substantive standard is fully justified as an appropriate balancing of the interests of employers and employees. Courts have used varying terminology in defining that standard. The standard molded by the Court from those prior formulations has sufficient teeth to ensure that employers do not use practices of dubious business utility, while not pressuring employers to resort to hiring and promotion quotas, and respecting the needs of employers to preserve legitimate management prerogatives. We find it unlikely that this formulation of the standard for a business justification will preclude the assertion of meritorious claims, particularly since the plaintiff may still prevail by showing that other reasonable business practices would satisfy the employer's need without producing a discriminatory effect.

Likewise, we think that the burden of persuasion remains with the plaintiff throughout a disparate impact case, just as it does in a case alleging intentional discrimination, *see Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 256–58 (1981), and just as it generally does when causation is an element of a violation. *See* Restatement (Second) of Torts § 433B (1965). We think it would be unjustifiable to impose a greater burden on an employer who is alleged to have violated Title VII by employing a practice that produced a disparate impact than on one who is alleged to have engaged in purposeful discrimination.

We are convinced that the Court thoughtfully balanced the competing interests and produced a workable distillation of some eighteen years of precedents applying the disparate impact standard. Indeed, the Court in large part adopted the approach urged by a brief filed by the United States. We believe that plaintiffs will be able to pursue successfully meritorious claims, and employers will not be unduly burdened in defending claims of discrimination and will not be encouraged to resort to quotas to ward off the threat of lawsuits based on statistical imbalances.

At the same time, we believe strongly that the changes proposed in S. 2104 would have serious adverse consequences. By altering all three of the conclusions reached by the U.S. Supreme Court, and placing on the employer the ultimate burden of identifying his own practices leading to a statistical imbalance and proving them to be "essential" to the conduct of his business, the proposal puts an employer in a nearly impossible position. It would be difficult for an employer not to adopt a silent practice of quota hiring and promotion in an effort to protect himself from the real probability of litigation and liability wherever a statistical imbalance is shown.

Martin v. *Wilks, supra*, arose in the context of a civil rights action, but it turned on principles of fairness and access to court that apply in every area. The Court held that firefighters, who had not been parties to a consent decree that mandated racial preferences, could have their day in court to contend that the decree violated their civil rights. The Court rejected the so called collateral attack doctrine, pursuant to which some courts had heid that once a decree was entered, it could not be challenged, even by individuals who had not been parties to the original lawsuit.

The Court's decision turned on a straightforward application of the Federal Rules of Civil Procedure and underlying notions of due process. The Federal Rules establish procedures for joinder of all interested parties in a case. Under those procedures, anyone who is not joined in a lawsuit, and given an opportunity to appear in court to protect his or her rights, cannot be bound by the final judgment. The Court's decision is a reaffirmation of the fundamental notion that everyone, regardless of race or gender, is entitled to his or her day in court. The Department of Justice advocated the position adopted by the Court. I did not work on that brief, but I signed a similar brief arguing the same approach a year earlier in *Marino* v. *Ortiz*, 484 U.S. 301 (1988).

We think that this decision should have a salutary effect. By requiring early joinder of all those who may be adversely affected by a lawsuit, the decision should enable courts to consider the full range of interests affected by a proposed decree. The decision should lead to fairer, more carefully considered, and unassailable remedies for discrimination. It will discourage defendants from settling discrimination cases by bargaining away third party rights, rather than making whole the actual victims of discrimination. In addition, the participation of all of the affected parties in formulation of a decree should aid in its implementation. Successful, voluntary compliance with Title VII may depend upon the cooperation of a broad range of individuals. Involving as many of those individuals as possible in formulating the decree will lead to smoother and more effective implementation of the remedy for discrimination.

The proposed legislation relating to *Wilks* would reverse, in the context of civil rights consent decrees, the usual practice under our system of civil litigation. In

stead of requiring that outsiders be joined by the parties to litigation if they are to be bound, the legislation would put the burden on outsiders to inject themselves into a dispute between others. Persons with no current interest in issue must be on the lookout for on-going litigation whose resolution may at some point impact upon them.

Neither the burden on these non-litigants to join or be bound, nor the burden on the judicial system of such expanded and unfocused lawsuits, is wise as a matter of policy. Nor do we believe that it is fair to bind, as the proposed bill does, anyone who has actual notice of the lawsuit, or who lacks actual notice but whose interests are adequately deemed protected by others, or, failing that, wherever "reasonable efforts" are made to give actual notice. Indeed, we believe that serious due process issues are presented.

In *Price Waterhouse* v. *Hopkins*, —— U.S. ——, 109 S. Ct. 1775 (1989), the Court ruled in favor of a woman who alleged that she had been denied partnership by her accounting firm on account of her sex. In that case, the Court faced a so called mixed motive case in which plaintiff alleged that her sex had supplied part of the motivation for her rejection for partnership. The Court held that once she had established by direct and substantial evidence that sex played a part in the decision, the burden shifted to the employer to show that it would have reached the same decision had sex not been considered.

The proposed legislation takes the startling step of allowing a damage recovery based solely on the discriminatory thoughts of an agent of the employer, which have no consequence to the plaintiff. For, contrary to the Court's conclusion that Title VII is not violated where the employer proves that the adverse action would have resulted even in the absence of any discriminatory motive, the proposed legislation recognizes a violation and a damage remedy in that circumstance. I believe that this would be the first instance ever in American law where damages could be recovered solely for thinking bad thoughts.

We also need to be clear on one other point. As this Committee is aware, the President, and the Attorney General have strongly supported the Americans with Disabilities Act (ADA), and have worked closely with Congress, and the disability community to devise the version that passed the Senate with administration support. I was not personally a party to that process. Accordingly, others are in a better position to answer detailed questions concerning it. However, I do think it is important to make the following point.

Title I of the ADA, as agreed to, dealing with employment, incorporates by reference remedies available under Title VII. It was very clear at the time of our discussions that the fact that these remedies were limited to injunctions, back pay, and other equitable relief that can be obtained without triggering the Constitution's civil jury requirement was critical to the administration's agreement.

In light of the fact that legislation altering these remedies has now been introduced, our continuing support for the ADA hinges on the clarification that the remedies provisions of the ADA will not be affected by the proposed Kennedy-Hawkins amendment of the remedies available under Title VII. This will require amending the reference to Title VII in the Senate version of the ADA. We look forward to cooperating with this Committee and others to assure that the goal of bringing 43 million disabled Americans into the mainstream of American life through passage of the ADA, a goal that we all share, is not thwarted by disagreements about other areas of the law.

In summary, we believe that the U.S. Supreme Court acted prudently and correctly, and in reasonable interpretation of existing statutes and case law, in its decisions in the *Wards Cove*, *Wilks*, and *Price Waterhouse* decisions. These decisions should be allowed to stand.

At the same time, with regard to *Patterson* and *Lorance*, we urge Congress to act quickly to enact our proposals. It is apparent that the administration and the sponsors of S. 2104 are in substantial agreement on these issues, and we propose that S. 2166, the administration's bill, therefore be acted upon expeditiously.

I would be pleased to respond to any questions.

The CHAIRMAN. Thank you. Thank you very much.

We will instruct the staff that we will try to follow the 10-minute rule, just at the outset here.

I would like to turn to the *Price Waterhouse* v. *Hopkins* decision and also to your own reaction to that. The Court suggested that even when a victim demonstrates that discrimination actually motivated an employment decision, the employer can escape all liabil-

ity if it can show that it would have taken the same action without discriminatory intent.

As you pointed out, our bill would modify that rule. You, I believe, mischaracterized that provision, suggesting that it would punish discriminatory thoughts even if they don't lead to the action, which is simply wrong.

Under our bill, if a victim can show that prejudice was actually a motivating factor for an employment decision, the firing, for example, the employer has violated the law. Where the employer can show that it would have fired the employee anyway for non-discriminatory reasons, however, the victim cannot obtain an order putting him or her back on the job; but the court can issue an injunction against discriminatory conduct recurring in the future.

Now, my question, Mr. Ayer, is why do you think that the law should tolerate discrimination playing any role in any employment decision?

Mr. AYER. Well, I think, as I understand the bill—and let me clarify, and if I am mistaken I would like to be corrected—as I understand the proposal, there is no test in the bill that in any way qualifies the nature of the role that discrimination is playing.

That is to say, we know when you're triggering the provision says you can't get injunctive relief, we know that the person would have been, let us say, terminated or not promoted without regard to the discrimination that was in someone's mind, because that is what triggers that unavailability of injunctive relief is the fact that it would have happened anyway.

So, all I understand to be the case from the proposal is that discrimination must be a motivating factor; that is to say it must be in the mind of the decisionmaker. I assume it must be in the mind of the decisionmaker and not in one of his employees who had no role in the decision. And it must be entertained in his mind in some sense in conjunction with the decision to terminate. So perhaps he says to himself, if he says anything to himself, perhaps he says, "So-and-so, a woman, is not doing a good job. She's incompetent and she's not performing effectively. Therefore, we are not going to promote her, and anyway I would rather not have a woman in that job."

If it is determined that the first reason is sufficient, then what we are doing is creating a damage remedy for thinking the thought that he would not like to have a woman, let us say, in that role.

Now, I guess I have a question, if we are going to award damages for that thought in that context where in fact the result would have occurred in any event and in fact the actual motivating and causative reason is an accurate and fair assessment that she wasn't performing effectively, then why not award damages every time someone can prove that an employer has had a bad thought?

Now we do have a remedy for harassment, and we ought to have a remedy for that. But I think if we are going to go to the level of not looking at words that someone says but merely the holding of a thought, then I am afraid I think, although I am not in favor of holding those sorts of thoughts, I am afraid that I think that we have intruded very far into the thought processes, the free thought processes, of people in this country. And I think it's a dangerous precedent to set.

The CHAIRMAN. Well, I think that is a misreading of the legislation, because the burden falls on the plaintiff to show that a discriminatory motivation actually contributed—was a motivating factor—in the decision, and has to demonstrate that and has to prove it. If they aren't able to prove it, then we are not dealing with what this particular provision provided. They have to prove it.

Now, the Justice Department's own brief in *Price Waterhouse* recognized that title VII might be violated by an employment decision motivated, in part, by discrimination even if the employer can show that it would have taken the same action regardless of the discrimination. This is what the administration's brief provided: "Illegal motive is a cause for a given outcome if the motive was sufficient by itself to produce the outcome or if it was a necessary element in any set of factors that together were sufficient to produce the outcome.

"This is not the same as 'but for causation,' because an illegal motive can be a cause for an outcome even if a legitimate motive or a set of legitimate motives was also sufficient to produce the outcome."

So our bill requires that discrimination may be a motivating factor for the employment decision. The victim must show that the discrimination contributes to the decision. That is consistent with the department's decision in *Price Waterhouse*. Why is the administration changing its position now?

Mr. AYER. Well, I think there is one very important distinction between the two positions, and that is that the brief, the Government brief in *Price Waterhouse*, says that the factor, the discriminatory factor, must be shown to be itself sufficient to bring it about. And this bill does not say anything about that. This bill talks about it being a motivating factor.

The CHAIRMAN. Well, would you supply that, because I don't understand that to be a part of the brief that was submitted.

Mr. AYER. Well, you just read it. You just read it to us.

The CHAIRMAN. "Or if it was a necessary element in any set of factors that together were sufficient to produce the outcome."

Mr. AYER. All right. But it must be—it must itself—be either itself sufficient——

The CHAIRMAN. All it says is a factor, as I gather it. Just be a factor.

Mr. AYER. I think it is very clear the analogy that that argument is based upon is the analogy of the case of *Summers* v. *Tice* in the situation where you have two people shooting at the same person or object and either one can be found to be the tort-feasor. And in order for that to be true, each must be sufficient in and of itself, and I think, you know, frankly, the point that the Senator is making would be quite correct if the bill were to say that the motivating factor, that the discriminatory motivating factor, must in and of itself be shown to be sufficient. And if that were shown, then I think that your argument based on the Government's brief would be correct. But that is no part of the bill, as I understand it.

Can I give an example? If, for example, you had a partnership of 100 lawyers and they vote with regard to partnership, and let's say it's required to be unanimous, and a woman is up for partnership and 99 vote against her on the basis that they don't believe she's

qualified or has done a good job and one votes against her and says or at least acknowledges when asked that he voted against her because she was a woman. And a majority vote is required.

That strikes me as a situation where it is at least possible, and I don't think ridiculous to suggest, that gender discrimination is a motivating factor, but it is certainly not a sufficient motivating factor, and it is certainly not fairly described as the reason why or even a substantial reason why she was turned down for partnership. And yet I have the sense that it either would be or might very well be covered by this proposed bill and might be a basis for awarding damages.

I think what we're talking about is really invading the area of free thought and free speech when we move this far down the road.

The CHAIRMAN. We will move on, but the continuation in the brief, which we will make part of the record, states: "Only if the discriminatory votes were not sufficient either by themselves or in combination with other votes could it be said that the discriminatory votes were not a cause of the decision."

It seems to me that the department has taken a different position there.

Mr. AYER. Well, I don't believe we are, but if you would enter that brief in the record, I think it will speak for itself.

The CHAIRMAN. All right.

[The Department of Justice brief follows:]

But if we are truly serious about eliminating all forms of discrimination in the workplace, then we cannot allow any reliance on racist or sexist stereotypes. Therefore, the bill makes unlawful any consideration of illegal motives by employers.

I look forward to reviewing the testimony from today's witnesses. I am pleased that we are moving forward quickly on this critical legislation. I consider it the most important piece of civil rights legislation that we have had before the Congress in many a year.

The CHAIRMAN. Thank you very much, Senator Metzenbaum.

Our first witness today, the Deputy Attorney General Donald Ayer, who is testifying on behalf of the Department of Justice and the Bush administration. Before assuming his present position, Mr. Ayer was most recently the deputy solicitor general.

We are glad to have you here.

STATEMENT OF HON. DONALD B. AYER, DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. AYER. Thank you, Mr. Chairman.

The CHAIRMAN. We express our appreciation to you for getting your testimony up to us as well.

Senator HATCH. Yes. I appreciate that. I read it last night.

The CHAIRMAN. That makes it, for many of us, a more effective hearing. Thank you.

Mr. AYER. Well, we try to move as fast as we can, but we don't always move as fast as we would like.

Mr. Chairman, I am very happy to be here today to present the views of the Bush administration on the major civil rights decisions of the last term and, more specifically, with regard to S. 2104, labeled the Civil Rights Act of 1990.

It is our view that there is no more important matter than assuring the fair treatment of our citizens, which I take to mean protecting against present discrimination and also providing strong remedies for harms that are found to have occurred in the past.

We believe that the issues presented in these five or six or seven, depending how you count them, significant civil rights decisions of last term are difficult issues and that it is very important that we evaluate these decisions on their own terms as individual matters rather than as simply a pattern that can be assimilated together.

It is our view, in general, that the decisions reached by the Court, while we would change some in terms of the results and do indeed advocate legislation, as you all are aware, that nonetheless all of those decisions are well within the zone of reasonable interpretation and represent very serious and careful efforts on the part of the nine-member U.S. Supreme Court to grapple with what are, I think we all have to agree, very difficult and very important issues.

The policy issues presented by these decisions and by the pending legislation are really, I think, perhaps the clearest case one can imagine where a serious national debate of an in-depth and careful sort is appropriate, and I hope by my participation today to contribute in some small way to that debate, and I look forward to following the debate as it goes forward over the next few weeks.

From our perspective, the issues need to be approached with a couple of fundamental assumptions in mind. One of those is, I think, a principle that is so ingrained in our system and ingrained in our consciousness that it isn't articulated as often maybe as it ought to be, but it is basically the proposition that in our society people should not be judged either by the color of their skin or by certain other characteristics that are immutable and really not relevant in terms of their ability to perform a particular job.

We believe, as I am sure the Senators here today do, that that is an ideal. It has been an ideal of ours in this country for many years. It is an ideal and a goal toward which we must continue to aspire. Unfortunately, as we are again all aware, it is an ideal which has not been achieved entirely. We have made progress, but there is a great deal more work to do.

So that it is a very important part of our policies, and must continue to be, to oppose intentional discrimination and to provide remedies wherever it exists.

At the same time, I think it is important for us to note that it is our view is one of accepting the position that the U.S. Supreme Court has laid out with regard to affirmative action remedies—that is to say, race-conscious remedies—which the U.S. Supreme Court has found to be appropriate in some limited circumstances, tested by particular tests that the U.S. Supreme Court has laid out.

As I say that, I am conscious of the fact that that proposition is in some tension with the initial proposition of aspiring toward a society where intentional discrimination is completely irrelevant.

It is in tension because affirmative discrimination or affirmative action is itself a form of intentional discrimination, and I would say the saving, the saving element that reconciles those two, although leaving them in tension, are the carefully limited circumstances within which that sort of affirmative remedy has been found by the U.S. Supreme Court to be appropriate, the best and easiest-to-follow example being, I think, the U.S. Supreme Court's decision in *City of Richmond* v. *Croson*, decided last term as well, where the Court made clear that minority set-aside provisions are sometimes acceptable but only in circumstances where there has been an identified pattern, history of discrimination which has been carefully identified and focused on by those who are putting together the minority set-aside program, and then, second, where the program itself, whatever shape it may take, is carefully and narrowly tailored to meet that historic problem of past discrimination.

I think that sort of an approach of identifying the discrimination problem and then narrowly tailoring a remedy, that I think defines essentially the limits within which affirmative action or reverse discrimination or whatever phrase you want to use to describe it is appropriate in our society. It is a limited place but, I think, in some situations an important place.

Well, with those sort of basic principles as background, I want to say that the administration has done, I think, exactly what the President and the attorney general indicated it would do last summer following the U.S. Supreme Court decisions of last term; that is, it has monitored and followed the application of the U.S. Supreme Court's decisions in the Courts, district Courts, and

Courts of Appeals across the country and has thought hard, I think, about to what extent those decisions have resulted in situations where remedies for discrimination are no longer adequate, situations calling for some action by the Congress to change the laws in this country.

What we have concluded, as you all are aware, I think, is that important changes are necessary in two areas. The first is the situation posed by the U.S. Supreme Court's decision in the *Patterson* case involving section 1981, which deals with intentional racial discrimination in connection with contracting. The U.S. Supreme Court read the language of that statute, read the words "make and enforce," which are indeed the words of the statute, to mean precisely that, one might say read them narrowly in terms of their precise meanings, and I must say in that, I think, acted reasonably.

But at the same as I say they acted reasonably, I think the Court left us with a situation plainly requiring legislative change. Legislative change is required because we now are in a situation where section 1981 reaches only intentional discrimination in the entering into of contracts or in connection with the judicial or other enforcement of contracts and intentional racial discrimination involved in harassment in connection with the contract, whether it is an employment contract or some other kind of a contract; terminations, racially motivated terminations; racial motivations with regard to the terms and conditions, either making them or changing them.

None of that is covered, and we think it is important that this major civil rights post Civil War statute relating to intentional racial discrimination cover the whole gamut of the relations involving contracts.

So we favor a change which is quite close to that enunciated in S. 2104. Although the language is slightly different, I think, in substance it is essentially the same.

The other area where we favor a change is in connection with the U.S. Supreme Court's decision in *Lorance* v. *AT&T Technologies*. That case involves seniority provisions.

The specific holding there was that while the application of a facially discriminatory seniority provision will start the statute of limitations running anew because it is in fact a new violation of title VII, the Court said on the facts before it that where the seniority provision is not facially discriminatory though intentionally discriminatory both in its adoption—it was motivated for intentionally discriminatory reasons, and in application when you look at the context you see that it works a discriminatory effect—because it is not on its face obviously discriminatory, the Court said that its application is not in and of itself a violation of title VII.

The United States filed a brief in *Lorance*, taking the contrary position. The United States believes that the application of a seniority provision, whether facially or not facially discriminatory, ought to be a violation of title VII, and we are proposing legislation, again similar though not identical to that in S. 2104, which would make that change.

In four other major areas, and some minor ones, I think, though I will speak mainly to the major ones, the department and the administration are in disagreement with the proposals of S. 2104.

And I will try to go briefly through those major points and leave the minor points to questions, if there are any.

With regard to the *Wards Cove* decision, wherein S. 2104 proposes to change three aspects of the U.S. Supreme Court's decision, we believe that the proposed legislation would have the effect of putting a burden on employers such that they would realize that they would virtually never—and I only say virtually because I hesitate to say absolutely never—but virtually never be able to prevail once a case, a prima facie case showing adverse impact had been shown.

The three changes relate to the proposed legislation's requirement: First—or I should say removal of the requirement stated by the U.S. Supreme Court that a specific employment practice be identified by the plaintiff—under the proposed legislation, it is sufficient for a plaintiff to simply focus on a group of employment practices, which is defined very broadly.

Second, the proposed legislation would make clear that the burden shifts to the employer to show job-relatedness, the particular standard of job-relatedness being also changed, and that is the third element of the legislation and, I think, the most important one and the one that we have the greatest problem with, is the legislation's proposal that what the employer must now carry the burden of proving is that the employment practice is essential, not that it is job-related, not that it is in manifest relationship to the job or any of the other terms that the U.S. Supreme Court in a number of decisions over the last 15 years has utilized; rather this bill substitutes a brand-new term—that is, the concept of essentiality—which appears, to my knowledge, in only one U.S. Supreme Court decision, the *Dothard* decision, and in that case is plainly used to describe not the test—it is not a question of whether the employer's test is essential—but it is rather used to describe a particular trait. And of course, the problem was that the test failed to measure the trait.

I think if you read that carefully in *Dothard*, you will see that the references to essentiality really have nothing to do with the employer's height and weight test; they rather have to do with the question of strength. And it is, really, I think, an inept and largely irrelevant utilization of the term.

Now, in *Wards Cove*, the one point I do want to make, and I would be happy to say more about it, is that I think a fair reading of the U.S. Supreme Court's prior cases fairly completely refutes the assertion that *Wards Cove* is a major departure from prior law.

There is an argument to be made, I think, or I think it's fair to say, that reading a number of U.S. Supreme Court decisions with regard to the burden of proof issue, one could find ambiguity in those decisions. They talk in terms of burden of showing, burden of demonstrating. A variety of terms are used.

The U.S. Supreme Court itself, in the *Sweeney* decision, *Board of Regents* v. *Sweeney*, I think, in 1978 in the context of disparate treatment, described and focused on those particular instances of terminology and found that in the context of disparate treatment they were fairly read to talk about the burden of production. So I think, though there is ambiguity in the prior U.S. Supreme Court

decisions, it is a very fair reading to say the burden stays on the plaintiff.

More importantly, I think that the structure of our law, both in terms of title VII and in terms of the shifting of burdens, the burden ought to stay on the plaintiff. Two reasons why:

One is title VII made clear that the mere showing of an impact does not state a title VII violation, and if you shift the burden to the employer, you are creating a situation where indeed the mere showing of an impact does state a title VII violation.

Second, under Federal Rule of Evidence 301, it is stated that a presumption, which I think is essentially what we are dealing with when you have a prima facie case of disparate impact, a presumption does not shift the burden of proof, it shifts the burden of production. And that is quite consistent with what the U.S. Supreme Court did here.

With regard to *Martin* v. *Wilks*, we also believe that the decision was correctly decided. At issue there is a rather fundamental point in our legal system concerning a person's right to have a day in Court. And S. 2104 would create a situation where one need not even have notice of the provision when it is enough that reasonable efforts were made.

The specific three elements of S. 2104, I would be happy to talk about at greater length. But we are really dealing with a situation here where I believe that if the language of S. 2104 were adopted, we would have implemented an unconstitutional provision in violation of the due process clause.

And I guess more to the point, I think we need to think long and hard before we start doing people out of the right to go to court because their going to court is going to be disruptive of some other policy effort we are trying to make, particularly when they go to court the disruption comes from the vindication of their constitutional rights. If we are going to set aside consent decrees or other discrimination-related court orders by result of allowing collateral attack, it is going to be because those orders are found to violate fundamental rights of other people. And I think we want to be very careful about denying people their right to have a day in court to pursue those constitutional rights.

The final decision I want to focus on is *Price Waterhouse*, and I would say there quite simply that I believe this proposal would have the effect of imposing liability on employers for the simple act of having improper and impure thoughts, the reason being that the bill makes clear that the discriminatory thought need not be the cause of the injury that is asserted in the title VII action.

Finally—and this relates to an aspect of the bill which is not related to a U.S. Supreme Court decision, the basic rewrite of title VII in S. 2104—there are issues, I think, relating to the adequacy of remedies in certain situations. And those, I think, need to be focused on their merits, specifically to assure that advent remedies are adequate.

The problem with the proposal in this legislation is that it does a wholesale rewrite and remake at the conceptual level of title VII. Title VII is a piece of legislation that I think has served this country very well for 25 years. It reflected a very important compromise at the time it was enacted, and it was aimed principally at

maximizing the chances that victims of discrimination would be put back into the positions, restored to their rightful place, and the effect of discrimination could be minimized.

One of the elements of that is the mediation process that is explicit in title VII, where someone takes his case first to the EEOC or to a State mediation agency.

Another important part of it are the equitable remedies relating to back pay and reinstatement and front pay, which specifically were intended not to include compensatory and punitive damages.

What this legislation will do, in my opinion, is create a machinery of litigation that will actually, I think, impair the effect of title VII, the beneficial effect of title VII of actually putting people back in place. While it will provide some useful affirmative remedies where they may be inadequate now, in many, many other areas the remedies, I think, are quite adequate and indeed are very beneficial to plaintiffs.

And by creating a 2-year statute of limitations by apparently creating a broad provision relating to continuing violations—and frankly, I am unclear on precisely how broad the 2-year statute of limitation provision is to be read with regard to the creation of continuing violations.

So that, in effect, in many instances there may be no statute of limitations at all, and by creating the possibility for really almost endless damages to be paid and penalties to be assessed against employers, we are creating a very strong adversarial situation which I think sadly in many cases is going to hurt plaintiffs as much or more than it hurts defendants, because what plaintiffs need many times and what they often, but not always, can be given through title VII is the real chance to get their life back together and to move beyond the discrimination which they have been victimized by.

What this bill will do, I think, is to create a sort of a bonanza or a potential bonanza not only for lawyers but for also plaintiffs and, I think, change the focus of the litigation in a way that will not be good for either the parties involved or for society.

So that, I think, is a fair overview of our position on the major aspects, and I would be happy to take any questions you all may have.

[The prepared statement of Mr. Ayer follows:]

Prepared Statement of Donald B. Ayer

Mr. Chairman, distinguished members of the Senate Committee on Labor and Human Resources:

It is an honor to appear before you today to testify regarding the U.S. Supreme Court's rulings last term involving civil rights issues, and S. 2104, entitled the Civil Rights Act of 1990. The administration has a strong commitment to the civil rights of all people. We believe that there must be strong remedies to root out discrimination wherever it may exist. Unfortunately, racism and bigotry cannot be viewed as wholly problems of the past. As the President said in his State of the Union message: "Every one of us must confront and condemn racism, anti-semitism, bigotry, and hate. Not next week, not tomorrow, but right now. Every single one of us."

We congratulate the Senate for passing, with administration backing, the Hate Crimes Statistics Act, which, once enacted, will help us to get a better picture of this problem and to focus our resources where they are most needed. In the first year of this administration, the Department of Justice indicted some 89 defendants in 56 separate cases for criminal civil rights violations. We filed or participated in

34 cases under the new Fair Housing ACt amendments, which only became effective as of March 12. And we filed a dozen employment discrimination cases. As our activities suggest, we are using vigorously the tools available to us and, for the most part, we find those tools effective.

The U.S. Supreme Court last Term issued some thirteen decisions that touched one aspect or another of civil rights law. In some of these cases, the government had urged the position adopted by the Court. In others, the Court disagreed with the government. Thereafter, the President and Attorney General both pledged last June that the administration would carefully monitor the application of these decisions in the lower courts to determine their effect on meritorious civil rights claims and respond accordingly.

We have done exactly that. Based on our own studies and comments from groups, including the NAACP Legal Defense and Education Fund, we have concluded that of the five most significant decisions, two reach results that merit legislative action. Thus, we believe that Congress should amend the law to require a different result from that reached by the U.S. Supreme Court in *Patterson* v. *McLean Credit Union*, —— U.S. ——, 109 S. Ct. 2363 (1989), and *Lorance* v. *AT&T Technologies Inc.*, —— U.S. ——, 109 S. Ct. 2261 (1989). Accordingly, the administration supports legislation that has been introduced by Senators Thurmond, Dole, Hatch and Coates (S. 2166) to address the problems created by these cases. With regard to three other cases, based on our review of how these rules have been applied,[1] we see no need for corrective action.

In supporting legislative action in some areas and opposing it in others, we are guided by a fundamental principle that grows out of our history, and is now a part of the fabric of our law: that people should not be judged or dealt with according to the color of their skin or certain other irrelevant personal traits. We take this as a common value that all decent people can agree upon. I will begin by discussing those areas where we think this principle dictates the enactment of new legislation.

In *Patterson*, *supra*, an employee brought an action pursuant to 42 U.S.C. § 1981, alleging that her employer had harassed her on the job, failed to promote her, and ultimately discharged her, all because of her race. The Court held that Section 1981 is limited by its terms to prohibiting discrimination in "mak[ing] and enforc[ing] contracts," and does not extend to "problems that may arise later from the conditions of continuing employment." *Patterson*, —— U.S. at ——, 109 S. Ct. at 2372. Thus, the Court held, the statute prohibits discrimination, whether governmental or private, in the formation of a contract, and in the right of access to a legal process that will enforce established contract obligations without regard to race. According to the Court, however, the plaintiff's allegations of harassment on the job addressed only conditions of employment and were not actionable pursuant to Section 1981.

The *amicus* brief filed by the Department of Justice, on which my name appears, argued for a somewhat broader reading of Section 1981, which would have extended its coverage to claims of harassment that would constitute a violation of state contract law. Our review of the cases applying *Patterson* over the last eight months further leads us to the conclusion that the Court's reading leaves a gap in the fabric of our civil rights laws that must be filled. We therefore support corrective legislation to ensure that section 1981 will apply to the performance, breach, and termination of contracts to the same extent that it does to their making and enforcement. At the same time, we believe that it is appropriate to codify the holding of *Runyon* v. *McCrary*, 427 U.S. 160 (1976), that section 1981 prohibits private, as well as governmental discrimination.

In *Lorance*, *supra*, female employees challenged a seniority provision pursuant to Title VII, claiming that it was adopted with an intent to discriminate against women. Although the provision treated all similarly situated employees alike, it produced demotions for plaintiffs, who claimed that the employer had adopted it with the intent to discourage women from entering a particular line of employment.

The U.S. Supreme Court held that the claim was barred under Title VII's statute of limitations, because the time for plaintiffs to file their complaint began to run when the employer adopted the allegedly discriminatory seniority system. The Court distinguished the situation where a seniority system discriminates on its face, acknowledging that in such a circumstance each application of the policy constitutes a new violation. However, where, as in the case before it, the provision is neutral on

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[1] These decisions are *Wards Cove Packing Co.* v. *Atonio*, —— U.S. ——, 109 S. Ct. 2115 (1989); *Martin* v. *Wilks*, —— U.S. ——, 109 S. Ct. 2180 (1989); and *Price Waterhouse* v. *Hopkins*, —— U.S. ——, 109 S. Ct. 1775 (1989). We also oppose any legislation aimed at *City of Richmond* v. *J.A. Croson Co.*, —— U.S. ——, 109 S. Ct. 706 (1989).

its face (although discriminatory both in purpose and effect), the Court concluded that only the initial enactment constitutes a violation.

The United States, and the EEOC, filed an *amicus* brief, on which my name appeared, supporting the plaintiffs. We argued that the plaintiffs' demotions were not merely the inevitable effects of the prior allegedly discriminatory adoption of the seniority system, but were instead direct, present applications of the seniority system, the effects of which had until then been only theoretical, and, as such, were "unlawful employment practices" that independently triggered Title VII's statute of limitations.

The rule adopted by the Court could have the result of shielding intentionally discriminatory seniority systems from attack by people who never have had an opportunity to challenge them. The discriminatory reasons for adoption of a seniority system may become apparent only when the system is finally applied to affect the employment status of the employees that it covers. Moreover, such an application surely focuses the controversy between an employer and an employee more sharply and permits more precise litigation. In addition, a rule that limits challenges to the period immediately following adoption of a seniority system will promote unnecessary and unfocused litigation. Employees will be forced to challenge the system before it has produced any concrete impact, or forever remain silent. Other employees, who are hired after the statute has run following adoption of a seniority system, will be barred from ever challenging the adverse consequences of that system, regardless how severe they may be. Such a rule fails to protect sufficiently the important interest in eliminating employment discrimination that is embodied in Title VII.

The administration therefore supports an amendment to section 706(e) of Title VII of the Civil Rights Act of 1964 that would restart the period for filing a charge each time an employee was injured by the application of a seniority system that was alleged to have been adopted with discriminatory intent.

We urge Congress to move quickly to enact these two important changes. At the same, we strongly believe that four other major changes proposed by S. 2104 should not be adopted. We are convinced that three of last Term's decisions, *Wards Cove Packing Co.* v. *Atonio*, —— U.S. ——, 109 S. Ct. 2115 (1989); *Martin* v. *Wilks*, —— U.S. ——, 109 S. Ct. 2180 (1989); and *Price Waterhouse* v. *Hopkins*, —— U.S. ——, 109 S. Ct. 1775 (1989), should be left intact.

In *Wards Cove*, the Court addressed three important issues concerning the burdens of proof in a lawsuit alleging that an employer's hiring practices have had the effect of discriminating in violation of Title VII. After reaffirming that statistics may form the basis for a prima facie case of disparate impact, and that the statistics must compare the employer's workforce to the pool of qualified job candidates, the Court addressed the issue of causation. The Court held first that a plaintiff must identify the specific employment practices that have produced the challenged disparate impact. Thereafter, the Court addressed the burdens imposed on the parties once a plaintiff has established a prima facie case of discrimination. It held that the employer's burden is to produce evidence that the "challenged practice pursues, in a significant way, the legitimate employment goals of the employer." *Wards Cove*, —— U.S. at ——, 109 S. Ct. at 2125–26. Finally, the Court held that the burden of persuasion always remains with the plaintiff, and that the plaintiff may defeat the employer's evidence by showing that reasonable alternatives would serve the employer's purpose equally well.

This seems to us to be a sensible and efficient allocation of litigation responsibilities. Asking the plaintiff to identify the specific practices that produce a disparate impact before employers are asked to justify them is consistent with traditional rules allocating burdens of proof. This allocation of responsibilities strikes us as more efficient than allowing plaintiffs simply to allege that a hiring system produces a disparate impact and forcing employers to demonstrate that each individual employment practice within that system does not have a disparate impact. In view of the liberal discovery rules and the record-keeping requirements of the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.1 *et seq.* (1988), we do not think that this requirement of specificity should unduly burden plaintiffs.

Indeed, the Court's prior "disparate impact cases have always focused on the impact of particular hiring practices on employment opportunities for minorities," *Wards Cove*, —— U.S. at ——, 109 S. Ct. at 2124, and plaintiffs have always targeted those specific practices. *See Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) (high school diploma requirement); *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977) (height and weight requirements for prison guards); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1977) (employment tests and seniority systems); *Connecticut* v. *Teal*, 457 U.S. 440

(1982) (written examination); *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977 (1988) (subjective judgment of supervisor).

In our view, the Court also correctly held that its formulation of the applicable substantive standard is fully justified as an appropriate balancing of the interests of employers and employees. Courts have used varying terminology in defining that standard. The standard molded by the Court from those prior formulations has sufficient teeth to ensure that employers do not use practices of dubious business utility, while not pressuring employers to resort to hiring and promotion quotas, and respecting the needs of employers to preserve legitimate management prerogatives. We find it unlikely that this formulation of the standard for a business justification will preclude the assertion of meritorious claims, particularly since the plaintiff may still prevail by showing that other reasonable business practices would satisfy the employer's need without producing a discriminatory effect.

Likewise, we think that the burden of persuasion remains with the plaintiff throughout a disparate impact case, just as it does in a case alleging intentional discrimination, *see Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 256–58 (1981), and just as it generally does when causation is an element of a violation. *See* Restatement (Second) of Torts § 433B (1965). We think it would be unjustifiable to impose a greater burden on an employer who is alleged to have violated Title VII by employing a practice that produced a disparate impact than on one who is alleged to have engaged in purposeful discrimination.

We are convinced that the Court thoughtfully balanced the competing interests and produced a workable distillation of some eighteen years of precedents applying the disparate impact standard. Indeed, the Court in large part adopted the approach urged by a brief filed by the United States. We believe that plaintiffs will be able to pursue successfully meritorious claims, and employers will not be unduly burdened in defending claims of discrimination and will not be encouraged to resort to quotas to ward off the threat of lawsuits based on statistical imbalances.

At the same time, we believe strongly that the changes proposed in S. 2104 would have serious adverse consequences. By altering all three of the conclusions reached by the U.S. Supreme Court, and placing on the employer the ultimate burden of identifying his own practices leading to a statistical imbalance and proving them to be "essential" to the conduct of his business, the proposal puts an employer in a nearly impossible position. It would be difficult for an employer not to adopt a silent practice of quota hiring and promotion in an effort to protect himself from the real probability of litigation and liability wherever a statistical imbalance is shown.

Martin v. *Wilks*, *supra*, arose in the context of a civil rights action, but it turned on principles of fairness and access to court that apply in every area. The Court held that firefighters, who had not been parties to a consent decree that mandated racial preferences, could have their day in court to contend that the decree violated their civil rights. The Court rejected the so called collateral attack doctrine, pursuant to which some courts had held that once a decree was entered, it could not be challenged, even by individuals who had not been parties to the original lawsuit.

The Court's decision turned on a straightforward application of the Federal Rules of Civil Procedure and underlying notions of due process. The Federal Rules establish procedures for joinder of all interested parties in a case. Under those procedures, anyone who is not joined in a lawsuit, and given an opportunity to appear in court to protect his or her rights, cannot be bound by the final judgment. The Court's decision is a reaffirmation of the fundamental notion that everyone, regardless of race or gender, is entitled to his or her day in court. The Department of Justice advocated the position adopted by the Court. I did not work on that brief, but I signed a similar brief arguing the same approach a year earlier in *Marino* v. *Ortiz*, 484 U.S. 301 (1988).

We think that this decision should have a salutary effect. By requiring early joinder of all those who may be adversely affected by a lawsuit, the decision should enable courts to consider the full range of interests affected by a proposed decree. The decision should lead to fairer, more carefully considered, and unassailable remedies for discrimination. It will discourage defendants from settling discrimination cases by bargaining away third party rights, rather than making whole the actual victims of discrimination. In addition, the participation of all of the affected parties in formulation of a decree should aid in its implementation. Successful, voluntary compliance with Title VII may depend upon the cooperation of a broad range of individuals. Involving as many of those individuals as possible in formulating the decree will lead to smoother and more effective implementation of the remedy for discrimination.

The proposed legislation relating to *Wilks* would reverse, in the context of civil rights consent decrees, the usual practice under our system of civil litigation. In

stead of requiring that outsiders be joined by the parties to litigation if they are to be bound, the legislation would put the burden on outsiders to inject themselves into a dispute between others. Persons with no current interest in issue must be on the lookout for on-going litigation whose resolution may at some point impact upon them.

Neither the burden on these non-litigants to join or be bound, nor the burden on the judicial system of such expanded and unfocused lawsuits, is wise as a matter of policy. Nor do we believe that it is fair to bind, as the proposed bill does, anyone who has actual notice of the lawsuit, or who lacks actual notice but whose interests are adequately deemed protected by others, or, failing that, wherever "reasonable efforts" are made to give actual notice. Indeed, we believe that serious due process issues are presented.

In *Price Waterhouse* v. *Hopkins*, —— U.S. ——, 109 S. Ct. 1775 (1989), the Court ruled in favor of a woman who alleged that she had been denied partnership by her accounting firm on account of her sex. In that case, the Court faced a so called mixed motive case in which plaintiff alleged that her sex had supplied part of the motivation for her rejection for partnership. The Court held that once she had established by direct and substantial evidence that sex played a part in the decision, the burden shifted to the employer to show that it would have reached the same decision had sex not been considered.

The proposed legislation takes the startling step of allowing a damage recovery based solely on the discriminatory thoughts of an agent of the employer, which have no consequence to the plaintiff. For, contrary to the Court's conclusion that Title VII is not violated where the employer proves that the adverse action would have resulted even in the absence of any discriminatory motive, the proposed legislation recognizes a violation and a damage remedy in that circumstance. I believe that this would be the first instance ever in American law where damages could be recovered solely for thinking bad thoughts.

We also need to be clear on one other point. As this Committee is aware, the President, and the Attorney General have strongly supported the Americans with Disabilities Act (ADA), and have worked closely with Congress, and the disability community to devise the version that passed the Senate with administration support. I was not personally a party to that process. Accordingly, others are in a better position to answer detailed questions concerning it. However, I do think it is important to make the following point.

Title I of the ADA, as agreed to, dealing with employment, incorporates by reference remedies available under Title VII. It was very clear at the time of our discussions that the fact that these remedies were limited to injunctions, back pay, and other equitable relief that can be obtained without triggering the Constitution's civil jury requirement was critical to the administration's agreement.

In light of the fact that legislation altering these remedies has now been introduced, our continuing support for the ADA hinges on the clarification that the remedies provisions of the ADA will not be affected by the proposed Kennedy-Hawkins amendment of the remedies available under Title VII. This will require amending the reference to Title VII in the Senate version of the ADA. We look forward to cooperating with this Committee and others to assure that the goal of bringing 43 million disabled Americans into the mainstream of American life through passage of the ADA, a goal that we all share, is not thwarted by disagreements about other areas of the law.

In summary, we believe that the U.S. Supreme Court acted prudently and correctly, and in reasonable interpretation of existing statutes and case law, in its decisions in the *Wards Cove, Wilks*, and *Price Waterhouse* decisions. These decisions should be allowed to stand.

At the same time, with regard to *Patterson* and *Lorance*, we urge Congress to act quickly to enact our proposals. It is apparent that the administration and the sponsors of S. 2104 are in substantial agreement on these issues, and we propose that S. 2166, the administration's bill, therefore be acted upon expeditiously.

I would be pleased to respond to any questions.

The CHAIRMAN. Thank you. Thank you very much.

We will instruct the staff that we will try to follow the 10-minute rule, just at the outset here.

I would like to turn to the *Price Waterhouse* v. *Hopkins* decision and also to your own reaction to that. The Court suggested that even when a victim demonstrates that discrimination actually motivated an employment decision, the employer can escape all liabil-

ity if it can show that it would have taken the same action without discriminatory intent.

As you pointed out, our bill would modify that rule. You, I believe, mischaracterized that provision, suggesting that it would punish discriminatory thoughts even if they don't lead to the action, which is simply wrong.

Under our bill, if a victim can show that prejudice was actually a motivating factor for an employment decision, the firing, for example, the employer has violated the law. Where the employer can show that it would have fired the employee anyway for non-discriminatory reasons, however, the victim cannot obtain an order putting him or her back on the job; but the court can issue an injunction against discriminatory conduct recurring in the future.

Now, my question, Mr. Ayer, is why do you think that the law should tolerate discrimination playing any role in any employment decision?

Mr. AYER. Well, I think, as I understand the bill—and let me clarify, and if I am mistaken I would like to be corrected—as I understand the proposal, there is no test in the bill that in any way qualifies the nature of the role that discrimination is playing.

That is to say, we know when you're triggering the provision says you can't get injunctive relief, we know that the person would have been, let us say, terminated or not promoted without regard to the discrimination that was in someone's mind, because that is what triggers that unavailability of injunctive relief is the fact that it would have happened anyway.

So, all I understand to be the case from the proposal is that discrimination must be a motivating factor; that is to say it must be in the mind of the decisionmaker. I assume it must be in the mind of the decisionmaker and not in one of his employees who had no role in the decision. And it must be entertained in his mind in some sense in conjunction with the decision to terminate. So perhaps he says to himself, if he says anything to himself, perhaps he says, "So-and-so, a woman, is not doing a good job. She's incompetent and she's not performing effectively. Therefore, we are not going to promote her, and anyway I would rather not have a woman in that job."

If it is determined that the first reason is sufficient, then what we are doing is creating a damage remedy for thinking the thought that he would not like to have a woman, let us say, in that role.

Now, I guess I have a question, if we are going to award damages for that thought in that context where in fact the result would have occurred in any event and in fact the actual motivating and causative reason is an accurate and fair assessment that she wasn't performing effectively, then why not award damages every time someone can prove that an employer has had a bad thought?

Now we do have a remedy for harassment, and we ought to have a remedy for that. But I think if we are going to go to the level of not looking at words that someone says but merely the holding of a thought, then I am afraid I think, although I am not in favor of holding those sorts of thoughts, I am afraid that I think that we have intruded very far into the thought processes, the free thought processes, of people in this country. And I think it's a dangerous precedent to set.

The CHAIRMAN. Well, I think that is a misreading of the legislation, because the burden falls on the plaintiff to show that a discriminatory motivation actually contributed—was a motivating factor—in the decision, and has to demonstrate that and has to prove it. If they aren't able to prove it, then we are not dealing with what this particular provision provided. They have to prove it.

Now, the Justice Department's own brief in *Price Waterhouse* recognized that title VII might be violated by an employment decision motivated, in part, by discrimination even if the employer can show that it would have taken the same action regardless of the discrimination. This is what the administration's brief provided: "Illegal motive is a cause for a given outcome if the motive was sufficient by itself to produce the outcome or if it was a necessary element in any set of factors that together were sufficient to produce the outcome.

"This is not the same as 'but for causation,' because an illegal motive can be a cause for an outcome even if a legitimate motive or a set of legitimate motives was also sufficient to produce the outcome."

So our bill requires that discrimination may be a motivating factor for the employment decision. The victim must show that the discrimination contributes to the decision. That is consistent with the department's decision in *Price Waterhouse*. Why is the administration changing its position now?

Mr. AYER. Well, I think there is one very important distinction between the two positions, and that is that the brief, the Government brief in *Price Waterhouse*, says that the factor, the discriminatory factor, must be shown to be itself sufficient to bring it about. And this bill does not say anything about that. This bill talks about it being a motivating factor.

The CHAIRMAN. Well, would you supply that, because I don't understand that to be a part of the brief that was submitted.

Mr. AYER. Well, you just read it. You just read it to us.

The CHAIRMAN. "Or if it was a necessary element in any set of factors that together were sufficient to produce the outcome."

Mr. AYER. All right. But it must be—it must itself—be either itself sufficient——

The CHAIRMAN. All it says is a factor, as I gather it. Just be a factor.

Mr. AYER. I think it is very clear the analogy that that argument is based upon is the analogy of the case of *Summers* v. *Tice* in the situation where you have two people shooting at the same person or object and either one can be found to be the tort-feasor. And in order for that to be true, each must be sufficient in and of itself, and I think, you know, frankly, the point that the Senator is making would be quite correct if the bill were to say that the motivating factor, that the discriminatory motivating factor, must in and of itself be shown to be sufficient. And if that were shown, then I think that your argument based on the Government's brief would be correct. But that is no part of the bill, as I understand it.

Can I give an example? If, for example, you had a partnership of 100 lawyers and they vote with regard to partnership, and let's say it's required to be unanimous, and a woman is up for partnership and 99 vote against her on the basis that they don't believe she's

qualified or has done a good job and one votes against her and says or at least acknowledges when asked that he voted against her because she was a woman. And a majority vote is required.

That strikes me as a situation where it is at least possible, and I don't think ridiculous to suggest, that gender discrimination is a motivating factor, but it is certainly not a sufficient motivating factor, and it is certainly not fairly described as the reason why or even a substantial reason why she was turned down for partnership. And yet I have the sense that it either would be or might very well be covered by this proposed bill and might be a basis for awarding damages.

I think what we're talking about is really invading the area of free thought and free speech when we move this far down the road.

The CHAIRMAN. We will move on, but the continuation in the brief, which we will make part of the record, states: "Only if the discriminatory votes were not sufficient either by themselves or in combination with other votes could it be said that the discriminatory votes were not a cause of the decision."

It seems to me that the department has taken a different position there.

Mr. AYER. Well, I don't believe we are, but if you would enter that brief in the record, I think it will speak for itself.

The CHAIRMAN. All right.

[The Department of Justice brief follows:]

of good faith and fair dealing.[14] Accordingly, unless no reasonable person could have found the evidence of harassment here sufficient to support a breach of the covenant implied in North Carolina law, the matter should have been submitted to the jury with instructions that it find in favor of petitioner if the preponderance of the evidence showed that respondent, by its actions and for racial reasons, deprived petitioner of the benefit of this covenant implied in state law.[15] The failure of the court

[14] See, *e.g.*, *Commercial Nat'l Bank* v. *Charlotte Supply Co.*, 226 N.C. 416, 431-432, 38 S.E.2d 503, 513 (1946) ("[w]here complete performance is rendered impossible by a party to a contract who has the duty of counter performance, the latter cannot take advantage of his own act and refuse performance on his part"); *Mullen* v. *Sawyer*, 277 N.C. 623, 633-634, 178 S.E.2d 425, 431 (1971) (same); see also *Barron* v. *Cain*, 216 N.C. 282, 284, 4 S.E.2d 618, 620 (1939) (plaintiff may recover damages for breach of a lifetime service contract where plaintiff's failure to perform "was due to no fault of the plaintiff but was caused by the wrongful conduct of the defendant in assaulting the plaintiff with a deadly weapon, running him off of the premises and threatening to do him great bodily harm if he returned").

[15] Petitioner proposed (C.A. App. 22) the following jury instruction relating to her claim of racial harassment under Section 1981:

> The plaintiff has also brought an action for harassment in employment against the defendant, under the same statute, 42 U.S.C. § 1981. An employer is guilty of racial discrimination in employment where it has either created or condoned a substantially discriminatory work environment. An employee has a right to work in an environment free from racial prejudice. If the plaintiff has proved by a preponderance of the evidence that she was subjected to racial harassment by her manager while employed at the defendant, or that she was subjected to a work environment not free from racial prejudice which was either created or condoned by the defendant, then it would be your duty to find for the plaintiff on this issue. If she has failed to do so, or you are unable to tell where the truth lies, it would be your duty to find for the defendant.

The question whether the petitioner, by this proposed instruction and by any other statements or objections appearing in the record, has adequately preserved a claim of racial harassment based on the discriminatory denial of contractual opportunities or breach of express or implied contractual terms enforceable under state law is best left to resolution by the courts below, along with the question of the legal sufficiency of the evidence in support of such a claim.

below to view the case from this perspective makes defective its judgment that petitioner's allegation of racial harassment could not state a distinct claim under Section 1981.

II. THE PLAINTIFF IN AN ACTION UNDER 42 U.S.C. 1981 FOR ALLEGED DISCRIMINATION IN PROMOTION DOES NOT HAVE TO DEMONSTRATE THAT SHE WAS MORE QUALIFIED THAN THE PERSON WHO WAS ACTUALLY SELECTED FOR THE POSITION TO WHICH PLAINTIFF SOUGHT PROMOTION

The court below also held that, in order to find that respondent unlawfully discriminated against petitioner in denying her the promotion to the position of intermediate accountant, the jury had to find both that petitioner was more qualified than Susan Williamson, the woman that respondent actually selected for the position and, in addition, that petitioner was denied the promotion because of her race. This holding is plainly wrong.

A. The object of proof in a case initiated under 42 U.S.C. 1981 is discriminatory purpose. See *Goodman* v. *Lukens Steel Co.*, slip op. 8 n.10; *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. at 391. As in actions under Title VII, the "'factual inquiry'" in such a case is simply "'[whether] the defendant intentionally discriminated against the plaintiff'" on the basis of race. *United States Postal Serv. Bd. of Govs.* v. *Aikens*, 460

U.S. 711, 715 (1983) (quoting *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981)). Stated differently, "[t]he central focus of the inquiry in a case such as this is always whether the employer is treating 'some people less favorably than others because of their race * * *.'" *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 577 (1978) (quoting *Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977)).

B. This Court has made clear that evidence of discriminatory purpose may "take a variety of forms" (*Furnco Constr. Corp.* v. *Waters*, 438 U.S. at 578). The finder of fact may, for example, rely on direct evidence of intentional discrimination—that is, " 'eyewitness' testimony as to the employer's mental processes" (*United States Postal Serv. Bd. of Govs.* v. *Aikens*, 460 U.S. at 716). Alternatively, the finder of fact may rely on circumstantial evidence showing "that the employer's proffered explanation is unworthy of credence" (*ibid.* (quoting *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. at 256)). Such circumstantial evidence could include proof that the qualification upon which the employer has purported to rely has not been required equally of white and black candidates. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 804 (1973). "Other evidence that may be relevant to any showing of pretext includes facts as to the [employer's] treatment of [the plaintiff] during [her] prior term of employment * * * and petitioner's general policy and practice with respect to minority employment" (*id.* at 804-805). "On the latter point, statistics as to [the employer's] employment policy and practice may be helpful to a determination of whether [its actions] * * * conformed to a general pattern of discrimination against blacks" (*id.* at 805). But whatever forms the evidence takes, the ultimate question for the fact-finder remains whether the employee has shown by a preponderance of the evidence that the employer intentionally denied the employee the job or benefit in question because

of her race. See *United States Postal Serv. Bd. of Govs.* v. *Aikens*, 460 U.S. at 714, 715-716.

C. Viewed from this perspective, the holding of the court below—that, where the employer articulates the superior qualifications of another candidate as the basis on which it made a decision, the fact-finder must find both that the plaintiff was more qualified than the candidate who was actually selected and that the plaintiff was denied the promotion on the basis of race—is plainly wrong. The fact-finder need only find that the preponderance of the evidence establishes that but for the consideration of her race the plaintiff would not have been denied the promotion she sought. The plaintiff may demonstrate this fact by producing evidence that she was more qualified than the candidate who was actually selected. Or she may prove that she had the minimum qualifications necessary for the job and that other evidence—direct or circumstantial—establishes that the asserted justification of superior qualifications is simply a pretext for the employer's discriminatory motive. For example, the plaintiff may show that the employer denied her the promotion because of prejudice or stereotypical attitudes and beliefs on its part;[16] that the employer never truly considered the plaintiff for promotion;[17] that the employer's reasons constantly shifted;[18] that the em-

[16] See, *e.g.*, *Blalock* v. *Metal Trades, Inc.*, 775 F.2d 703, 707-708 (6th Cir. 1985); *Bell* v. *Birmingham Linen Service*, 715 F.2d 1552, 1556-1557 (11th Cir. 1983), cert. denied, 467 U.S. 1204 (1984); *Muntin* v. *State of Cal. Parks & Recreation Dep't*, 671 F.2d 360, 362 (9th Cir. 1982).

[17] See, *e.g.*, *Joshi* v. *Florida State Univ. Health Center*, 763 F.2d 1227, 1235 (11th Cir.), cert. denied, 474 U.S. 948 (1985); *Lowery* v. *WMC-TV*, 658 F. Supp. 1240, 1259 (W.D. Tenn. 1987); *Morris* v. *Bianchini*, 43 Fair Empl. Prac. Cas. (BNA) 674, 679 (E.D. Va. 1987).

[18] See, *e.g.*, *Kilgo* v. *Bowman Transp. Inc.*, 789 F.2d 859, 877 (11th Cir. 1986); *Schmitz* v. *St. Regis Paper Co.*, 811 F.2d 1130, 1132-133 (2d Cir. 1987).

ployer had no standards for measuring the contested qualifications;[20] that the selecting official did not know that the white applicant's qualifications were superior at the time of selection;[20] that the selecting official could not specify why he recommended the selectee and could not recall the selectivee's performance;[21] or that there is valid statistical evidence supporting the proposition that the plaintiff was a victim of a pattern and practice of racial discrimination on the employer's part.[22] But in all events, the fact-finder need not find that the plaintiff was more qualified than the candidate who was selected; it need only find, from the preponderance of the evidence, that the plaintiff would not have been denied the position but for the consideration of her race. The court below committed reversible error in requiring the fact-finder to make both determinations in this case.[23]

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[19] See, *e.g.*, *Monroe* v. *Burlington Industries, Inc.*, 784 F.2d 568, 572 (4th Cir. 1986).

[20] See, *e.g.*, *Eastland* v. *Tennessee Valley Auth.*, 704 F.2d 613, 626 (1983), modified on other grounds, 714 F.2d 1066 (11th Cir. 1983), cert. denied, 465 U.S. 1066 (1984).

[21] See, *e.g.*, *Krodel* v. *Young*, 748 F.2d 701, 708-709 (D.C. Cir. 1984), cert. denied, 474 U.S. 817 (1985).

[22] See, *e.g.*, *Plemer* v. *Parsons-Gilbane*, 713 F.2d 1127, 1137 (5th Cir. 1983); *Sweat* v. *Miller Brewing Co.*, 708 F.2d 655, 658 (11th Cir. 1983); *Anderson* v. *City of Albuquerque*, 690 F.2d 796, 801-802 (10th Cir. 1982).

[23] We take no position concerning whether petitioner's evidence was sufficient to persuade a trier of fact that respondent's decision was unlawfully motivated. We contend only that she should not have been required to prove her superior qualifications in addition to this unlawful motive. We note, however, that there is reason to doubt that petitioner can establish the requisite unlawful motive, since she may not have possessed the qualifications necessary to be considered for promotion to the intermediate accountant position when it was available. While this fact-bound question is not deserving of review by this Court, it should be addressed by the courts below on remand, before petitioner's promotion claim is resubmitted to a jury.

D. There is simply no basis for the court of appeals' suggestion (Pet. App. 20a) that a requirement of proof of superior qualifications "reflects the principle established in Title VII cases that an employer may, without illegally discriminating, choose among equally qualified employees notwithstanding [that] some may be members of a protected minority." While Title VII cases do establish that an employer "has discretion to choose among equally qualified candidates," they also establish that the exercise of that discretion may "not [be] based upon lawful criteria" (*Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. at 249). Cf. *City of Richmond* v. *United States*, 422 U.S. 358, 378-379 (1975). Once the fact-finder determines by a preponderance of the evidence that the employer denied the plaintiff the promotion because of her race, there is no basis for suggesting that the fact-finder should also have to determine that the plaintiff had superior qualifications in order not to impair the employer's discretion to choose among equally qualified candidates. In such a case, the fact-finder has already determined that the employer did not seek lawfully to exercise this discretion.

CONCLUSION

The judgment of the court of appeals should be reversed in relevant part.

Respectfully submitted.

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The CHAIRMAN. Let me go into a different area now. This is with regard to your comments on damages.

We were pleased to see the administration has concluded that the Court's decision in the *Patterson* case requires an amendment to section 1981 to fill the gaps left by that ruling. As you know, section 1981 permits the recovery of compensatory damages in case of intentional race discrimination, and in a particularly egregious case, punitive damages as well.

So the administration is on record supporting legislation to fill the loopholes in the law that permits victims of intentional race discrimination on the job recovery of compensatory or punitive damages.

Now my question is why not treat the victims of intentional sex, religious, or national-origin discrimination in the same manner as victims of intentional race discrimination? If you support damages for race discrimination, why not support damages for the other equally offensive forms of bigotry?

Mr. AYER. Well, I think racial discrimination has a history in this country that does make it, though not the only serious form of discrimination, it makes it unique. There is a history that we are all aware of, going back before even the Civil War, the history of slavery and a history of statutes, statutory remedies being enacted.

The CHAIRMAN. You can't find that same history with regards to women?

Mr. AYER. I don't find the same history, no. I find a different history.

The CHAIRMAN. Well, don't you find it particularly egregious and obnoxious and deplorable?

Mr. AYER. I think we have a serious problem of sex discrimination in this country. I think we also have a serious problem of handicap discrimination, and in certain areas, religious discrimination. We have a variety of kinds of discrimination, and all significant, but they are not all identical.

It is our view that the remedies of title VII have, by and large, worked quite well. And part of the reason they work well is that they don't create nuclear weaponry that impairs rather than facilitates resolution.

People want their jobs back. People want to be put in place, and when you create the potential of a bonanza court award, in many respects you impair the operation of that machinery to really get what people need and want.

And we believe that it is not incongruous to have different machinery, particularly when you have the section 1981 remedy, limited as it is, to intentional discrimination. We believe that if there are areas within title VII, and again I want to say that this whole subject now, as you all are well aware, goes well beyond the question of the U.S. Supreme Court's decisions of the last term, what we have principally done is to focus on the Court's decisions of last term as to what needs legislative change. The bill goes, in a number of respects, well beyond that, and this is one of them.

We are, I think, extremely reluctant and find it, I think, unwise to undertake in a hot second while we are rewriting a whole sheaf of provisions of our civil rights laws to add just one more that has nothing to do with the decision of last term that simply does noth-

ing more than totally remake the basic employment discrimination statute of this country.

We think it is a very important matter and ought to be addressed with due deliberation and caution. We agree that there are issues relating to sexual harassment, for example, that deserve serious thought with regard to the adequacy of remedies.

We have not made a proposal because we have focused our attention on the decisions of last term, but we do strongly believe that the reflexive response of simply saying across the board in every way title VII is inadequate so let's have compensatory and punitive damages and let's essentially throw away the mediational equitable-relief approach of title VII. We think that that is very unwise.

The CHAIRMAN. Well, my time is up, but I just fail to follow the logic of the argument when we are saying we are trying to deal with intentional race discrimination, on that issue, why we should not deal similarly with intentional discrimination on the basis of sex.

Now, you find that there is a difference in terms of history. I find them both, as well as discrimination in terms of the handicapped, to be offensive as well. You can talk about varying degrees in whatever ways you want, in a form of semantics, but nonetheless, they scar and stain, I think, the basic concept of equal justice under the law. And I just find it difficult to understand why the administration would not support the efforts to deal with that.

The final point I would just make—and as I say, my time is up—about whether we are making more complicated the administrative process. The Judiciary Committee heard from Mr. Thomas, who indicated as the former head of the EEOC, in both speeches and articles about the importance of including damages in terms of the administrative procedures. And Congress included those damages with the support of the Reagan Department of Justice in the 1988 fair housing law.

So it is difficult to understand the administration's position when I think it is basically trying to, as the guardian of the rights and liberties of our people, to have a rather narrow and confined attitude about these particular decisions and about what the results would be of trying to deal with them.

Mr. AYER. Could I just add one short point?

The CHAIRMAN. Surely.

Mr. AYER. That is that it is not our position that either sex discrimination or handicap discrimination or any of these other forms, religious discrimination, that those are not significant, that they are not blights on our system. We agree with you in that sense on that point.

Our point is that they are nonetheless different phenomenon which deserve to be considered in terms of how they actually work. And I offer just as a case in point the issue of the Americans with Disability Act, where as I understand it, though I was not involved in it, in the debate last year a compromise was at least tentatively reached to adopt the current title VII remedies in connection with disabilities.

Now, the point is that each of these problems is a little different. Each is important. Each is serious. Each needs to be remedied. But I think the sort of sweep-of-the-hand approach of simply saying,

"Here we are, we're fixing five U.S. Supreme Court decisions, and while we're at it why don't we just rewrite title VII sort of quick like," I don't think that's the way to go.

I think we need to think hard about it, and I am concerned that perhaps we are just moving a little too fast and ought to maybe focus separately on the things that don't relate to the U.S. Supreme Court decisions.

The CHAIRMAN. Well, the only point, and then I will yield, women aren't second-class citizens. Neither are the disabled. We will come back into the ADA at another time in terms of the questions because you referred to it in the course of your presentation, in your formal statement.

But I just find it absolutely baffling on the whole question we are talking about—intentional discrimination—of why, with the opportunity that we have now and the record that has been quite amply demonstrated across the landscape in our society, why the administration is not prepared to deal with that in our society at this time, to be absolutely incomprehensible.

Senator Hatch.

Senator HATCH. Mr. Ayer, are you familiar with the *New York Transit Authority* v. *Beazer* case?

Mr. AYER. Yes, I am.

Senator HATCH. That is the 1979 case. Would you tell us a little bit about that?

Mr. AYER. Well, basically what it involved was a rule of the New York Transit Authority that it would not employ people who were narcotics addicts. And what the U.S. Supreme Court——

Senator HATCH. Even methadone-maintained?

Mr. AYER. Well, that was the application in the particular case. But the general rule was that they would not employ anyone with a narcotics addition. And that was applied to some parties who ended up as plaintiffs in the case who were on methadone maintenance. And they sued alleging a disparate impact of the application of that rule to them on the ground that substantial proportion, disproportionate to the population of people on methadone maintenance who were applying for jobs or in the applicant pool were black.

And the U.S. Supreme Court in that case found, first, that the statistical evidence was extremely shaky, the evidence of a disparate impact. But thereafter it went on to say even if the evidence of disparate impact is viewed as sufficient, we find that there is sufficient job-relatedness. And it used particularly, I think, relevant terminology, relevant in the sense that it is virtually a statement of the holding of the U.S. Supreme Court inn the *Wards Cove* case concerning the standard that must be met in order to uphold a practice, a selection practice.

Senator HATCH. But *Wards Cove* was not an unusual case in that regard?

Mr. AYER. Not at all. No. I think *Wards Cove* is, with regard to the standard that is being posited, a very fair statement of what the U.S. Supreme Court had said before, acknowledging that the U.S. Supreme Court had used a range of terminology.

But just to quote the, I guess it's in footnote 31 of the *New York Transit* case, the Court stated that it was enough that the employ-

ment goals of the employer were "significantly served by even if they did not require the rule as applied to methadone users."

So you have right there in that footnote of a 1979 decision the concept that the selection device must significantly serve goals related to the job even if the goals don't actually require that that particular standard be used.

And that is only, I think, illustrative of the fact that over the years the U.S. Supreme Court in the *Griggs* case itself, in the *Albemarle* case, in *Dothard* v. *Rawlinson*, and *Watson*, they used terminology repeatedly like "manifest relationship," "job-related," expressions like that. And I think I can fairly say, although the word essential I think appears twice in the *Dothard* v. *Rawlinson* opinion, as I indicated in my opening statement, it is not used in the same way at all as it is used in this legislation.

Senator HATCH. Only because the employer claimed that his employment system was essential

Mr. AYER. Well, that's right. I think that's right. And what is described as essential strength is essential to the job. The problem was not whether strength is essential to the job, the problem is whether the height and weight requirement adequately measured strength.

Senator HATCH. The Court just ignored that word and went on and kept the same type of language it always has with regard to job-relatedness, manifest relationship.

Mr. AYER. That's correct.

Senator HATCH. Reasonable approaches toward business necessity.

Mr. AYER. Yes. And I do think that this is very important to note because I think this is the most important part of what is in issue in the *Wards Cove* provision of this legislation. The essentiality standard is going to work a very great change, and in all candor it is totally unfair and completely unreasonable to assert that the *Wards Cove* decision in that respect works some significant or even noticeable change in the law. It is just not so. And if you go back and read the previous decisions, you see very clearly that it is not so.

Senator HATCH. OK. But I would like to ask even a little further question on *Beazer*. What would S. 2104, this current bill, the Kennedy-Hawkins bill, do to the *Beazer* case in a rule no drug users will be hired in jobs which are not safety-sensitive?

Mr. AYER. Well, my impression is, if you take the word essential to mean what everybody understands it to mean, the employer would have to show that this test, that is, the exclusion of people who are drug addicts, including those on methadone maintenance, is essential to running the business. And the District Court, apparently, in *Beazer* noted that it wasn't required to have this standard though it was significantly related. And that was enough, the U.S. Supreme Court said.

I have got to believe that you would have a very hard time, indeed an impossible time, showing that not being on methadone maintenance is essential for nonsafety-sensitive jobs on the New York Transit System.

Senator HATCH. I think it would be impossible.

Mr. AYER. I think it would be, and I think the case would probably have to come out the other way, along with a lot of others.

Senator HATCH. Are you familiar with the 1981 *Chrisner* v. *Complete Auto Transit decision*?

Mr. AYER. I am.

Senator HATCH. That is from the Sixth Circuit. Could you describe that case, and answer this question while you're doing it?

Mr. AYER. OK.

Senator HATCH. What would this bill do to the *Chrisner* case and similar experience and education requirements? And in your opinion, would this bill inevitably erode the concept of employment standards in the workplace?

Mr. AYER. Well, the *Chrisner* case involved an employer's standard for selection of truck drivers.

Senator HATCH. Right.

Mr. AYER. Which required either 2 years of truck driving experience of completion of a training course, a truck driver training course.

Senator HATCH. Right.

Mr. AYER. And thereafter, after that particular standard was applied to exclude a particular woman applicant because she didn't have either of those two requirements met, the employer changed its standard. I can't remember what the new standard was, but it was a different one that worked in a different way.

So it's demonstrable that the particular standard was not essential, and yet the Court in that case plainly upheld it as plainly job-related. This was a requirement that specifically bore on the suitability of someone to perform a truck driving job; that is, did they have experience as a truck driver or had they had training as a truck driver?

It was upheld. Again, I think, under this standard it would plainly, I guess, be struck down if the word essential means essential.

Senator HATCH. It erodes the present employment standards at the workplace.

Mr. AYER. I think it would make it very hard for employers to implement a whole very broad range, I would say most, of the standards that they want to apply that did not have a direct and absolutely air-tight connection to the performance of the job. And frankly, I don't see how that is ever going to be possible to prove.

Senator HATCH. So most reasonable standards would be knocked out under this?

Mr. AYER. I believe they would be if they have a disparate impact. And of course, the real evil here is that employers are going to see that and employers are going to say, "The only way I can avoid a lawsuit, which I will lose, is to have my numbers right, to make sure that I have hired the right number of people statistically reflecting the applicant pool."

And that, of course, raises the initial concern that I raised in my opening statement, which is that we believe that intentional discrimination is wrong. It is morally wrong. It is to be avoided except in those very rare circumstances where a balance of history and narrow tailoring causes us to say go ahead. And it is to be avoided here, which I think what this would be would be an across-the-board rule to employer to simply set up quotas.

Senator HATCH. Yes or no: Hasn't every disparate impact case decided by the U.S. Supreme Court involved specific identifiable employment practices?

Mr. AYER. Well, all the ones that I am aware of have. I am not aware of any that haven't. The ones that people talk about certainly have.

Senator HATCH. In your view, under S. 2104, what would happen to the requirement that a plaintiff must show causation between the practice or practices he complains about and the disparate impact? The question of causation.

Mr. AYER. Well, I think what would happen, if we're talking now about the requirement of identifying a specific practice that is causative, in my understanding of the way this bill would work would be to say that there is no need to identify the practice and show the causation.

Senator HATCH. They would just allege all or any.

Mr. AYER. That's right.

Senator HATCH. And then it becomes the burden of proof for the employer to prove that every one of his employment practices have no effect on the disparate impact.

Mr. AYER. That's exactly right. They would have to go through and demonstrate either that they don't have an impact or he would have to prove them essential.

Senator HATCH. What does that mean in the law? Is that a normal change in the law?

Mr. AYER. Well, it would be unusual because normally a plaintiff is required to prove his or her case, and you have to define the elements of the case and then that burden falls on the plaintiff to prove it.

Senator HATCH. Instead of the plaintiff proving his or her case, the employer has to prove that he didn't do something even if he doesn't know what they're complaining about.

Mr. AYER. I think that's fair.

Senator HATCH. You bet it is.

In other words, under present disparate impact cases, they make a prima facie case by bringing out the disparate impact, the statistical analysis that shows there is a disparate impact, then the burden of production is shifted to the defendant, who has to show that he has got some reason that his job approach is all right. Then the burden of persuasion is to show that that specific complaint, that that specific job or workplace device has an impact that causes the disparate impact. Is that right?

Mr. AYER. That's right.

Senator HATCH. That would be completely changed by this bill.

Mr. AYER. It certainly would.

Senator HATCH. The defendant then becomes the person who has the burden of persuasion.

Mr. AYER. Yes.

Senator HATCH. All the plaintiff has to show is that there is a statistical disparity, which is easy to do sometimes.

Mr. AYER. I saw a videotape of Professor Fried's testimony, with whom I am good friends, and he made a point that—he said it in a couple of different ways—but he made a point which I think I agree with in one sense and would just like to highlight in another.

That is that the burden of proof, he said he is less concerned about than he is about the essentiality standard and the causation requirement.

I agree with him that that is less important, but I want to say very emphatically that there are very good and strong reasons why the burden ought to stay where it is on the plaintiff. And the one main one that I want to make, and I think it is very, very important conceptually for what our discrimination laws prohibit, is that you first have to figure out what the prohibited practice is.

And what we know, I think both from the legislative history of title VII and just from conceptually our idea of what it is that we are trying to forbid, is that the mere fact of an imbalance, while it states a prima facie case and it begins the process of proof, it does not establish a title VII violation.

The fact that there is an imbalance does not establish a title VII violation.

Senator HATCH. It just shows that statistically there is something in question here.

Mr. AYER. That's right.

Senator HATCH. Or may be in question here.

Mr. AYER. If you shift the burden to the employer, the burden of proof to the employer at that point, you have said that the burden, that that is all the burden of proof that the defendant must carry. If the employer does no more, presumably the plaintiff would win.

Senator HATCH. But under this bill, not only does the employer have to prove that every one of his employment practices has not caused the disparate impact, he has got to prove more than that: He has got to prove that they are essential to his business.

Mr. AYER. That is exactly right. That is exactly right.

Senator HATCH. Which is an unreasonable burden of proof.

Mr. AYER. Right. And, you know, we feel very strongly that the burden should, although it is not as big a problem in terms of the effect it will have as the essentiality standard, we feel very strongly that the burden of proof should stay on the plaintiff because it's part of his case. He hasn't made out his case when he has shown the statistical data.

Senator HATCH. That is the basic principle of American jurisprudence.

Mr. AYER. I think that's right.

Senator HATCH. If we start changing that so that people can haul anybody into court just on mere statistics and change the whole burden of proof and say that you've got to prove that you're not guilty here, without any proof that the person is, that is a pretty drastic change in the law, wouldn't you say?

Mr. AYER. Yes.

Senator HATCH. I could spend a lot more time on this because I think that a lot of people don't understand how significant this particular change or set of changes in the law really is.

But let me just go to *Martin* v. *Wilks* because I think that that's important.

You and I agree with the proponents of S. 2104 that persons should be—let me give you time. Did you want to say something else?

Mr. AYER. No, that's okay.

Senator HATCH. OK.

We agree with the proponents of S. 2104 that persons should be able to challenge a seniority system at a point at which the seniority system allegedly harms them. I think we all agree with that. Thus, we will all participate in overrule of *Lorance* v. *AT&T Technologies*, and persons like the women in that case would be protected. I mean that is going to happen.

Now, is S. 2104's overturn of *Lorance* consistent with S. 2104's overturn of *Martin* v. *Wilks*?

Mr. AYER. Well, I think there is a very great tension there, and the tension arises from the fact that in *Martin* v. *Wilks* the Court essentially stood up for the proposition that people have a right to a day in court, they have a right to have their issues litigated.

And in *Lorance* the Court essentially, in a different context—I am not saying that they are explicitly legally inconsistent, because they are dealing with different statutory language—but nonetheless in general I think there the proposition that is asserted is that you don't need to have a day in court where you define the violation in such a way that it happens only at the time when the provision is enacted.

We are in favor, the administration position is one that favors, protecting rights to a day in court in both the seniority provision context and the *Martin* v. *Wilks* context. And I think you are quite correct that there is an incompatibility between fixing *Lorance* and essentially unfixing, if you will——

Senator HATCH. There are some who would indicate that the grievances of the women who were barred in the *Lorance* case were real grievances which deserved a fair hearing, while the grievances sought to be raised in the *Martin* v. *Wilks* case were somehow not to be taken quite as seriously, not treated as generously. And that is just simply not the case.

Mr. AYER. Well, I don't want to characterize anyone's motives, because I don't know what their motives are, but I think that it's fair to say that we are giving a less favored treatment in this proposal. In S. 2104, we are giving a significantly less favored treatment to the rights of people wanting to come in and challenge consent decrees than we would be to the rights of people wanting to challenge seniority provisions.

Senator HATCH. Yes. This bill, in section 6, says that persons like the white fire fighters in Birmingham were allowed to get a subsequent trial on the merits of their claim if they assert that the consent decree is "transparently invalid."

In other words, someone who can show that a consent decree is transparently illegal as applied to him or her is able to get relief, but a person who can only show that he or she is the victim of mere illegality, illegality which is real but simply not transparent, is denied an opportunity to get any relief. Is that fair?

Mr. AYER. Well, I don't believe it is. I don't know what the concept of transparent illegality means, quite frankly, and I don't know that anybody else does.

Senator HATCH. It is a pretty evasive concept, isn't it?

Mr. AYER. And there is another problem there, and that is that if anyone is able to sort of crawl through the maze that you must get through in order to be able to challenge it, whether because nobody

even made a reasonable effort to give you notice or however you do it, I note also in the bill that any objection that you want to bring must be brought in the court where the consent decree is pending.

That, I think, is also quite a heavy burden to put on somebody who may work for a national company and may be employed in their West Coast office, where the consent decree was resolved in Boston and that person whose constitutional rights may well be impaired is going to have file his suit in Boston. I think that is a very questionable aspect of the bill as well.

Senator HATCH. It sure is.

Under this bill, a third party need not even receive any notice whatsoever of a pending lawsuit and still be precluded, as a practical matter, from bringing his or her own subsequent lawsuit. Isn't that correct?

Mr. AYER. That's true.

Senator HATCH. Under this bill, a third party could simply read about the lawsuit in a newspaper and later be precluded, as a practical matter, from his or her own lawsuit just on that so-called notice. Is that correct?

Mr. AYER. That is my understanding.

Senator HATCH. Is that fair?

Mr. AYER. I don't believe so.

Senator HATCH. In fact, under this bill, consider a person not even an employee who reads about a civil rights lawsuit between plaintiffs and an employer and a proposed consent decree.

Suppose this person simply applies for a job or tells a friend he or she is seriously thinking about doing so. If a consent decree is entered and the person later is hired, suppose he or she is adversely affected by the consent decree years later, that person, as a practical matter, is precluded from bringing a lawsuit. Is that a correct reading of it?

Mr. AYER. Well, it certainly may well be. I think the language of the proposal is somewhat vague. And that is one of its other problems is that it is not totally clear what it should mean.

I think the one thing we would have going for us is that a court would try to read it to make it constitutional, but I don't think they would succeed at that. I don't think they would be able to, and I think the reading you have just given is probably the one that they would have to give.

Senator HATCH. I notice my time has expired. But let me just end with this. You brought up the situation about a consent decree that is entered into in Boston against a multi-state employer. If an employee in Salt Lake City, far removed from Boston, wanted to later challenge that consent decree under the extremely limited opportunity presented by this bill, that person is going to have to challenge it in Boston.

The average employee just can't afford to do that. It's tough enough to get an attorney and pay the attorney let alone go to Boston to get an attorney. We all know that Boston attorneys are much higher-priced than others.

The CHAIRMAN. But they're very good, you know.

Senator HATCH. You're darned right.

Well, I think I just wanted to say to my dear friend from Massachusetts, this bill is well intentioned. I know that. I want to resolve

discriminatory wrongs. I want to forward and be progressive in doing what should be done in these civil rights areas.

But I think we have got to think this through before we change these basic jurisprudential concepts of law like we are going to do in S. 2104, and just do it because we put the term civil rights on a bill and everybody rolls over and plays dead around here. Besides, you go on television to debate it, and the one side says, "Well, this is a civil rights bill." Then the reporter turns to me and says, "Well, how come you're against civil rights?" And I have to explain two semesters of civil rights law in seven seconds. It is a little difficult to do.

And you have done an excellent job here. It has been fair. You have been straightforward. You have shown your commitment to civil rights, as far as I am concerned. I think you have shown a difference in testimony from what we have seen in the past in the Reagan administration, although I felt that they were fair and honest in their approach. And I think your words should be heeded here, as should the words of the former solicitor general, Charles Fried, who everybody knows is committed to civil rights, as I certainly believe and I think anybody would conclude you are.

So, I hope, if there are wrongs here, I hope that somehow somebody can point them out to me so that I can go along with you on this bill because maybe there are some ways that we can resolve these or adjust them or create some approaches that we can all come together on. And I would like to see that.

But I think he has made some awfully telling points and they are points that we have recognized from the beginning on this bill, and this bill really concerns me.

Well, I have chatted long enough and I have taken more time than I should have, and I apologize, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Hatch.

I would just mention that we understand that the bill would ensure that when a consent decree is proposed, all interested parties are given notice by the court and an opportunity to challenge the decree. So the employees would have a meaningful opportunity to challenge the decree at that time.

And by contrast, when the seniority plan is adopted, there is no court proceeding and no reason to believe that interested parties will receive notice that their rights might be affected. That is basically the underpinning of the distinction and why we have taken these different approaches.

I would like to put in the record at an appropriate place a letter signed by 15 professors of constitutional law concluding that the provisions of S. 2104 responding to the *Martin* v. *Wilks* decision are fully constitutional.

[The document referred to follows:]

PREPARED STATEMENT OF LAW PROFESSORS CONCERNING THE CONSTITUTIONALITY OF PROPOSED SECTION 6 OF THE CIVIL RIGHTS ACT OF 1990

Section 6 of the proposed Civil Rights Act of 1990 concerns "facilitating prompt and orderly resolution of challenges to employment practices implementing litigated or consent judgments or orders." The provision is designed to counteract the U.S. Supreme Court's recent decision in *Martin* v. *Wilks*, 109 S.Ct. 2180 (1989). Our conclusion is that proposed section 6 is constitutional.

In *Martin* v. *Wilks* the U.S. Supreme Court held that employees who are adversely affected by a consent decree may challenge employment decisions made pursuant to the decree. Such challenges to the employer's conduct pursuant to the consent decree may be brought even though the objecting employees failed to exercise an opportunity to intervene in the earlier proceedings that gave rise to the decree.

Prior to *Martin* v. *Wilks* it was "*settled* that a consent decree is not subject to collateral attack" under such circumstances. *Dennison* v. CITY OF LOS ANGELES, 658 F.2d 694, 695 (9th Cir. 1981) (emphasis added). Indeed, the Unite4d States Courts of Appeals for the First, Second, Third, Fifth, Sixth, Seventh, and Ninth Circuits all had expressly ruled that employees could not object to the implementation of consent decrees if they failed to exercise their opportunity for timely intervention. *See, e.g., Dennison* v. *Geary*, 765 F.2d 288 (1st Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986); *Marino* v. *Ortiz*, 806 F.2d 1144 (2d Cir. 1986), *aff'd. by an equally divided Court*, 108 S.Ct. 586-1988); *Society Hill Civil Assn.* v. *Harris*, 632 F.2d 1045 (3rd Cir. 1980); *Thaggard* v. *City of Jackson*, 687 F.2d 66 (5th Cir. 1982), *cert. denied*, 464 F.2d 900 (1983); *Stotts* v. *Memphis Fire Department*, 679 F.2d 541 (6th Cir. 1982), *rev'd. on other grounds sub. nom., Firefighters Local Union 1784* v. *Stotts*, 467 U.S. 561 (1984); *Burns* v. *Board of School Commrs.*, 437 F.2d 1143 (7th Cir. 1971); *Dennison* v. *City of Los Angeles Dept. of Water and Power*, 658 F.2d 694 (9th Cir. 1981). Only one Court of Appeals, the Eleventh Circuit, took the position ultimately adopted by the U.S. Supreme Court and allowed objecting employees to later challenge consent decrees. *See, e.g., In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492 (11th Cir. 1987), *aff'd. sub. nom., Martin* v. *Wilks*, 109 S.Ct. 2180 (1989).

The United States Court of Appeals for the Second Circuit explained the well-established law as it existed prior to *Martin* v. *Wilks*:

> It is well-settled that collateral attacks on consent decrees in Title VII actions are not permitted. The salutory policies underlying this rule are familiar. Allowing the terms of a consent decree to be contested in separate lawsuits would raise the specter of inconsistent or contradictory proceedings, would promote continued uncertainty thus undermining the concept of a final judgment and would violate the policy of promoting settlement in Title VII actions.

Marino v. *Ortiz*, 806 F.2d at 1146 (citations omitted).

Section 6 of the proposed Act would amend section 703 of the Civil Rights Act of 1964 to overturn *Martin* v. *Wilks* and to restore the law to what it was in almost all of the country before that decision. In fact, the proposal would increase the protections provided to employees who are not parties to the litigation giving rise to the consent decree. The proposal adequately protects the due process rights of employees by encouraging them to participate by intervention in the initial litigation and by leaving open the possibility of subsequent collateral attacks in the circumstances provided in Rule 60(b) of the Federal Rules of Civil Procedure (section 6(m)(2)(C)).

Due process requires notice and an opportunity to be heard. The proposal provides this to all employees who are limited in their later ability to challenge consent decrees. Specifically, the proposal refers to three categories of employees. First, the proposal speaks of employees who had notice of the proposed judgment or order before it was entered "sufficient to apprise such person that the proposed judgment or order might affect the interests of such person." Such individuals are barred from later challenges only if they had "a reasonable opportunity to present objections to such judgment or order." (Section 6(m)(A)(2)). Because the proposal expressly assures these individuals notice and an opportunity to be heard, such employees are not denied due process if they forego that opportunity.

Second, the proposal states that individuals who do not have notice of the proposed judgment or order will be barred "if the court determines that the interests of such person were adequately represented by another person who challenged such judgment or order prior to or after the entry of such judgment or order." (Section 6(m)(B)). As Professor Larry Kramer noted, "Due process permits the preclusion of other litigants if their interests are sufficiently close to the interests of the parties. This, for instance, is what makes class actions possible." Kramer, *Consent Decrees and the Rights of Third Parties*, 87 Mich. L. Rev. 321, 350 (1988). In *Hansberry* v. *Lee*, 311 U.S. 32, 42-43 (1940), the U.S. Supreme Court explained that consistent with due process, "members of a class not present as parties to the litigation may be bound by the judgment where they in fact are adequately represented by parties who are present." Thus, the second class of litigants who are limited in their ability to later attack consent decrees have their due process rights protected through litigation by those with very similar interests.

Finally, the proposal restricts later attacks on consent decrees by those for whom the court determines, prior to entry of judgment or order, that there were "reasona-

ble efforts . . . to provide notice." The dissenting Justices in *Martin* v. *Wilks* explained why limiting the ability of individuals to challenge consent decrees does not violate due process. Justice Stevens, writing for Justices Brennan, Marshall, and Blackmun, stated:

> As a matter of law there is a vast difference between persons who are actual parties to litigation and persons who merely have the kind of interest that may as a practical matter be impaired by the outcome of a case. Persons in the first category have a right to participate in a trial and to appeal from an adverse judgment; depending of whether they win or lose, their legal rights may be enhanced or impaired. Persons in the latter category have a right to intervene in the action in a timely fashion, or they may be joined as parties against their will. But if they remain on the sidelines, they may be harmed as a practical matter even though their legal rights are unaffected. . . . *The fact that one of the effects of a consent decree is to curtail the job opportunities of nonparties does not mean that the nonparties have been deprived of legal rights or that they have standing to appeal from the decree without becoming parties.*

109 S.Ct. at 2188, 2189 (Stevens, J., dissenting) (emphasis added).

Moreover, due process requires only reasonable efforts to provide notice to affected individuals and this is provided. *See, e.g., Texaco, Inc.* v. *Short*, 454 U.S. 516 (1982); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.") As Professor Kramer explained: "The due process clause ought to leave the decision to adopt more efficient procedures to the legislature. *Due process requires only that the procedures employed in adjudication not be 'fundamentally unfair.'* " Kramer, *Consent Decrees and the Rights of Third Parties*, at 347 (emphasis added). The proposed Act restricts the third category of employees from later challenging consent decrees only if there were reasonable efforts to provide notice prior to the entry of the judgment or order. In order for these individuals to be limited in their ability to object to the consent decree a court must determine *prior to the entry of judgment or order* that reasonable efforts at notice were provided.

Due process analysis involves a careful balancing of the competing interests. *See, e.g., Mathews* v. *Eldridge*, 424 U.S. 319 (1976). Because of the important interest in facilitating consent decrees, limits on subsequent challenges are imperative. Consent decrees are often indispensable in employment discrimination litigation. Unless there are limits on subsequent challenges to decrees, employers often will be very reluctant to agree to settle the matter. Also, without restrictions on later challenges, there is a great risk of inconsistent and contradictory proceedings.

Finally, it must be noted that such individuals still may attack judgments and orders pursuant to consent decrees under the limited circumstances outlined in Rule 60(b) of the Federal rules of Civil Procedure. At the least since 1874, it has been established that third parties may attack judgments obtained through fraudor collusion or entered by a court lacking jurisdiction. 109 S.Ct. at 2189 n.5 (Stevens, J., dissenting). The proposed Act in section 6(m)(2)(C) expressly allows such challenges.

In conclusion, section 6 of the proposed Act would restore the law to its pre-*Martin* v. *Wilks* status and thus advance civil rights and the fight against employment discrimination. The proposal carefully protects the rights of those who are limited in their ability to subsequently challenge consent decrees. In fact, the Act would provide greater safeguards than existed in most of the country prior to *Martin* v. *Wilks*. The proposal is consistent with the due process clause and is an important step to restoring civil rights.

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Mr. AYER. Senator, could I just address briefly that point you just made?

The CHAIRMAN. Surely.

Mr. AYER. The S. 2104 also, though, allows people to be bound by either a judicial decision or by a consent decree not only where they had an actual notice but where they did not have actual notice, and first of all, where their interests are "adequately represented by others," which is an interesting point and something that gives them some protection.

But in fact we need to know what that means. For example, the instance of someone who doesn't even work for the company at the time the consent decree is entered into but whose later interest in being considered without racial discriminatory effect is represented by someone who is there in the suit, presumably that person will be bound even though he was not even an employee at the time.

Finally, of course, the proposed legislation allows someone to be bound even if he didn't get notice and even if his interests were not adequately represented where "reasonable efforts were made to give notice," whatever that means.

So I presume that that means, although I am not sure, that you could simply publish in the newspaper a notice that we are about to enter into a consent decree that would have the following effects and 5 years later somebody who just went to work and wanted to come in and say, "Wait a minute, I am white and I am being discriminated against," and there is no adequate history of discrimination to support this, it is not narrowly tailored, etc., I presume that that person would be out in the cold.

I also presume that you could have it work the other way, where a consent decree might harm the interests of minority individuals or harm the interests of labor unions or harm the interests of other people. It is not always going to be one way. It is not always going to be working against, you know, white fire fighters.

It's going to work different ways, and my concern is what we are doing is dismantling again—this is a different kind of useful machinery—but we are basically creating an aberration in our system

of civil procedure to fix what we think is a specific problem. But I think it's a mistaken perception.

The CHAIRMAN. Well, just in a brief response, your concern about the reasonable efforts, that language is based directly on the U.S. Supreme Court's language in *Mullane* v. *Central Hanover Trust Company*.

Mr. AYER. That is a class-action case.

The CHAIRMAN. Yes. Well, so are these other class-action cases. You can make many of the comments that you just made here against those other types of class-action cases. I mean my time is up. We may get a chance to come back to it. But many of the criticisms that you have made with regard to the way we have outlined that approach here could also be directed at general class-action cases.

Senator Metzenbaum.

Senator METZENBAUM. I just have a couple of questions, Mr. Chairman.

You indicated that race discrimination is different from other types of discrimination and that is why you endorse full damage remedies under section 1981 but will not support similar damages under title VII.

I have some difficulty with this, particularly in view of the President's statement to the Congress. I really question whether he shares that view and if he is aware of the position that the Attorney General is taking. He did not seem to share that vies in his State of the Union Address when he said we must "condemn racism, bigotry, antisemitism and hate now."

I do not understand how you make that distinction that he didn't make and why you make it.

Mr. AYER. Well, the point I am making, and I want to make this as strong as I possibly can, is that the point that Senator Kennedy made about maybe suggesting or at least making note of the fact that women and religious minorities and others are not second-class citizens or that discrimination relating to them is not second-class discrimination, we agree absolutely and completely with all of that.

The point that I am making is that, first of all, we are trying to respond to the decisions of last term and have in that context recommended a modification of section 1981. The point I am making is that those other issues should be given a substantial amount of direct attention and focused on their own merits. In my tentative view at the moment is that—and I think I guess it's more than a tentative view—is that title VII has worked, by and large, quite well in most areas and that it will lose a good deal of its utility for plaintiffs by virtue of the changes that you are talking about.

Let me just say it will lose a good deal of its utility for minority race plaintiffs as you make the changes that you have outlined. Section 1981 is a separate statute and a separate remedy. It is often brought in conjunction with a title VII remedy, but it is a separate proceeding.

What you essentially propose in this bill is to say that that is the only machinery. You almost say that is the only machinery we need is the full-blown litigation, punitive damage, compensatory damage, jury trial, long statute of limitations kind of a remedy,

and you take out of the arsenal of plaintiffs the 25-year-old, very effective, very well-thought-out title VII remedy that has long existed.

It is simply not sustainable to state that all we are doing is restoring title VII. This is a total reconceptualization of title VII. And my point is we ought to think about it very carefully. I am not saying that under no circumstances should we think about additional remedies for sexual harassment or for religious harassment.

We are not saying that. We are saying we ought to think long and hard about it. We lose a significant amount if we give up the title VII machineries, and let's don't just rush off and throw out title VII and put in what is generally speaking a section 1981 remedy across the board as the only remedy.

The CHAIRMAN. The only thing—if the Senator would just yield—just regarding the characterization of the legislation, we are not throwing that out, we are adding to the arsenal. We are adding to the arsenal, and quite frankly, you know, I think we ought to be careful about being patronizing to various plaintiffs on what range of remedies that they think are necessary in order to acquire justice.

I mean you know, we can get to where we are thinking "what is really in their best interest because we know best, you know," kind of attitude as well. I think what we have basically found in oversight of EEOC and title VII over a period of time, all victims want is justice.

Senator METZENBAUM. And they just want to be treated alike, and it just seems to me, Mr. Ayer, that if something looks like a cat, talks like a cat and meows like a cat, then it must be a cat. And what you are doing here is you are making a distinction between racial discrimination, sexual discrimination, and religious discrimination—it is all still intentional discrimination. You are then saying that, "Well, we ought not to rush into it."

We are not rushing into it. We are going to have 4 days of hearings on it. At the conclusion of that time we would like to move forward and treat discrimination against women and religious bigotry in the same way as we treat racial discrimination. Then we would like to have the administration on board.

And for all of the statements that you have given, and you certainly have been very eloquent, the fact is there is a distinction the administration is making that we think is inappropriate. And my guess is that the women and other groups in this country would feel the same way about it.

And we would hope that you might discuss it with the President, go back to his State of the Union message and say shouldn't our position be reversed and shouldn't we get on board. That is all I am saying.

Thank you, Mr. Chairman.

The CHAIRMAN. We are glad to have the Senator from South Carolina. I just saw you down there at the Veterans' Affairs Committee just a few moments ago.

Senator Thurmond. Yes. I just saw you down there, too. [Laughter.]

The CHAIRMAN. Well, we saw each other. We're glad to have you. Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Chairman, I am pleased that we are continuing this series of hearings to determine the appropriate legislative response to recent U.S. Supreme Court decisions which impact on discrimination issues.

One particular decision we will receive testimony on today is *Patterson* v. *McLean Credit Union*, 109 U.S. Supreme Court 2362, 1989. A majority of U.S. Supreme Court justices held that 42 U.S.C. 1981 was limited by its terms to prohibiting discrimination in the formation and enforcement of contracts. The Court, in a 5–4 ruling, did not extend section 1981 to "postformation" discriminatory conduct related to the conditions of employment.

Traditionally, on-the-job racial harassment has been governed by the provisions of title VII. The Bush administration has recommended extending the scope of section 1981 protection to not only the right to make and enforce contracts but also in the performance, breach, or termination of a contract or in the setting of the terms and conditions thereof.

Also, we will today consider the implications of the *Price Waterhouse* v. *Hopkins* decision, which appropriately articulated the standards of proof in so-called mixed-motive cases. In a plurality decision led by Justice Brennan, the Court set the standards of proof in cases where an alleged discriminatory animus may be the result of both permissible and impermissible employer motivation.

Once a plaintiff has shown that an unlawful consideration was a motivating factor, the burden of persuasion rests on the employer to prove by a "preponderance of the evidence" that the same result would have been reached in the absence of the alleged discriminatory factor.

Also, we will hear from witnesses on the chairman's proposal to dramatically alter the remedial scheme of title VII by authorizing compensatory and punitive damages in disparate impact cases. While this is not in response to any specific U.S. Supreme Court decision, I assume the chairman felt, sua sponte, if you will, that now is the time to offer this particular language.

While my schedule will not allow me to remain for the entire hearing, I look forward to reviewing the testimony of the distinguished witnesses with us today.

And I am very glad to have Mr. Ayer here and to hear his testimony. He is a very able lawyer, and I am sure he will present his side well.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator Thurmond.

We are going to have to move on, Mr. Ayer, but I wanted just to raise that issue with regards to the ADA. My own sense, having been very much involved, with Senator Harkin as a member of this committee, is that basically we were looking for parallelism in terms of the enforcement remedies.

I read through your statement, prior to the hearing, about that particular provision, and I will have some questions for you basically with regard to the ADA.

My very firm understanding is we made that bill consistent with title VII but we never made a commitment or pledge that we were

never going to come back and revisit that title. It was quite clear that we were. So I will revisit title VII.

So I wanted just to make that comment, and I will submit some questions to you on that and some of the other issues.

You have been very forthcoming, and we appreciate your testimony here. As we mentioned to the Attorney General, we want to work with you, but we are very, very much concerned about these decisions. And while we are addressing these decisions, it seems to me apparent that when there are other egregious kinds of conditions which exist in our society, as we are addressing some, I think it is incumbent that we address others. We have some differences, and we appreciate the administration's position. We hope we are going to be persuasive as we move on down the line. But we are grateful for your presentation here.

Mr. AYER. Thank you, Senator. We look forward to working with you.

[Responses of Mr. Ayer to questions from Senators Jeffords and Hatch follow:]

LETTER FROM MR. AYER TO SENATOR KENNEDY WITH RESPONSES TO WRITTEN QUESTIONS FROM SENATORS JEFFORDS AND HATCH

Dear Senator Kennedy:

This letter responds to the written questions submitted by members of the committee following my testimony regarding S. 2104, the Civil Rights Act of 1990.

The first set of questions was submitted by Senator Jeffords. I shall respond to the questions in the order in which they were presented.

Question. You testified that the administration carefully monitored the application of the U.S. Supreme Court's 1989 Civil Rights decisions to determine their impact on meritorious claims.

—Can you provide the committee with the administration's statistics or other data on those effects?

—What standards did the administration utilize when measuring the impact of the court's rulings?

Answer. The Administration's monitoring of the application of last Term's Supreme Court decisions focused primarily on *Wards Cove Packing Co.* v. *Atonio*, 109 S. Ct. 2115 (1989); *Patterson* v. *McLean Credit Union*, 109 S. Ct. 2363 (1989); *Martin* v. *Wilks*, 109 S. Ct. 2180 (1989); *Price Waterhouse* v. *Hopkins*, 109 S. Ct. 1775 (1989); and *Lorance* v. *AT&T Technologies, Inc.*, 109 S. Ct. 2261 (1989). Regarding each, we examined reported decisions and, in particular, those decisions in which one of the monitored cases played a substantial role. Our guiding standard throughout our monitoring has been to determine whether meritorious complaints of discrimination can be vindicated—including whether they are subjected to fair procedures—and including whether they are subjected to fair procedures—and whether those that lack merit fail.

With respect to *Wards Cove*, we identified some 14 reported decisions involving substantial applications of the U.S. Supreme Court's decision.Four of those were outright victories for plaintiffs; three were remanded for further consideration in light of *Wards Cove*; and in seven defendants prevailed. Our clear conclusion after examining these cases is that plaintiffs with meritorious claims can, after *Wards Cove*, still prevail without difficulty on a disparate impact theory of discrimination pursuant to title VII. A prima facie case of disparate impact discrimination may still be established on the basis of statistical proof, and courts have not accepted without careful examination the business justifications offered by employers.

The record regarding *Patterson* was equally clear, but it pointed strongly in the direction of legislative change. The results of our monitoring were generally consistent with facts reported by other groups, including the study done by the NAACP Legal Defense and Education Fund. We identified some 100 claims of racial discrimination—many of which appear meritorious—that were dismissed outright in the months following *Patterson*. A substantial number of these plaintiffs were left with-

out any Federal remedy for their grievances. In the face of this record, we strongly urge legislative overturning of *Patterson*.

Our monitoring of *Lorance* turned up eight significant reported decisions. Those decisions in conjunction with our study of the Court's opinion convinced us that the rule announced in *Lorance* would work substantial injustice by barring meritorious claims from court. We also concluded that much of the impact of *Lorance* would not appear in the reported decisions because the decision would deter individuals from filing lawsuits.

Our examination of the cases involving *Price Waterhouse* reveals that the decision has worked quite favorably for plaintiffs and has surely not led to injustice. Indeed, we have identified nine major decisions involving *Price Waterhouse*, and all of them have gone in the plaintiff's favor. Based on data we have collected, there is no basis for overturning this decision.

Our monitoring of *Martin* v. *Wilks* has turned up two significant decisions. One of those permitted a collateral attack to be brought, but rejected it on the merits. The other remanded a collateral attack for consideration on the merits. In the remand of *Martin* v. *Wilks* itself, the district court has scheduled hearings for the plaintiffs to present evidence that the consent decree is violating their employment rights; that evidence will be evaluated in due course by the judge who entered the original decree. Our monitoring has not revealed injustices resulting from the decision.

Question. You testified that the administration agrees Congress should overrule *Patterson* v. *McLean Credit Union* and *Lorance* v. *AT&T*. The language in the relevant provisions of S. 2104 and S. 2166 differs. Do you regard these differences as significant? If so, why?

Answer. We think that there are significant disparities in the language of S. 2104 and S. 2166 regarding both *Patterson* and *Lorance*, and we strongly urge adoption of the language of S. 2166. S. 2104's provision regarding *Lorance* contains two apparent and significant limitations. First, it would apply only to seniority systems that are adopted as part of a collective bargaining agreement. Apparently, it would not apply to a non-union shop or where a seniority practice was not the result of a collective bargaining agreement, or where a collective bargaining agreement had expired but the seniority system remained in place.

Second, S. 2104 does not make explicit that an unlawful employment practice also occurs when a discriminatory seniority system is adopted and when an employee first becomes subject to it, even though it has not been applied in any tangible sense to the employee to produce some employment consequence. Rather, this amendment states only that the unlawful employment practice occurs when the system is applied.Thus, an employee may be precluded from challenging a discriminatory seniority system any time before it is applied to him or her.

By contrast, S. 2166 would reach all seniority systems, regardless of whether they were part of a collective bargaining agreement. It also makes explicit that an employee may challenge a discriminatory system when it is adopted, when the employee first becomes subject to it, and when the employee suffers some injury by virtue of the application of the system. We, therefore, urge adoption of the language of S. 2166.

In overturning *Patterson*, both S. 2104 and S. 2166 would extend the protection of section 1981 to every aspect of contract performance and termination. S. 2166, however, goes beyond S. 2104 by codifying the holding of *Runyon* v. *McCrary*, 427 U.S. 160 (1976), that section 1981 reaches private, as well as governmental conduct. While the U.S. Supreme Court declined to overrule *Runyon* in *Patterson*, this provision ensures that *Runyon* will remain the law of the land.

Question. How would the removal of section 3, subsection (o), defining "business necessity" affect your criticism of sections 3 and 4? What, if any, other definitions would you consider appropriate for an affirmative defense of business necessity?

Answer.By requiring employers to meet the virtually impossible burden of proving that each practice was "essential to effective job performance," the definition of business necessity in S. 2104 tilts the scale unacceptably toward plaintiffs and inevitably increases the pressures to adopt quotas. While this is probably the most objectionable feature of the treatment of the *Wards Cove* decision in S. 2104, even if that problem were somehow eliminated, the other provisions are problematic. Thus, we also oppose the bill's attempt to overturn the specific causation and burden of production/proof holdings of *Wards Cove*. Most fundamentally, we think, as I testified, that *Wards Cove* was correctly decided. It does not represent a major change in the law. It does represent a careful balancing of the need to permit meritorious claims of discrimination while not forcing employers to resort to hiring fixed numbers of minorities and women.

Question. You expressed concern over what you perceive as a potential for section 6 to deny an individual his or her right to a day in court. The right to a day in court is not absolute. Statues of limitation, for instance, eventually cut off the right to a day in court. If the touchstones of due process are noticed and an opportunity to be heard, how does section 6 function more onerously than a statute of limitation?

Answer. The principal difference between section 6 of the bill and a statute of limitations is that a statute of limitations only cuts off claims after they have arisen and after the complainant has had a reasonable time and opportunity to present his or her claim. Section 6 would exterminate claims before they even arose and surely well before individuals were afforded an adequate opportunity to assert their claims. Indeed, section 6 would terminate the rights of individuals who had not even been born yet, much less have suffered a wrong and been given a reasonable opportunity to seek redress. Moreover, statutes of limitations work automatically by virtue of law and individuals are justifiably charged with notice of their existence. The same cannot be said of the cutting off of legal claims by virtue of a court proceeding regarding which the affected individual does not have notice and an opportunity to present his or her claim.

Question. Almost by definition, disparate impact cases are class actions. The Court has set due process standards for notice in class actions. Does section 6 fail to comply with the Court's standards for class notifications? If you believe so, please explain.

Answer. Many disparate impact cases are not class actions. Thus, it is not possible to speak of the two as synonymous. For those disparate impact cases that are not class actions, it is likely that section 6 does not comport with due process. While there is an argument that individualized notice is not always required in certain class actions—those brought pursuant to Fed. R. Civ. P. 23(b) (1) and (2)—this is a limited exception that does not apply outside the peculiarities of a class action and, likely, could not be extended to all of the actions covered by section 6. See *Martin* v. *Wilks*, 109 S. Ct. at 2184 n.2; *Hansberry* v. *Lee*, 311 U.S. 32, 41 (1940). The special rules for class actions should not swallow the fundamental principle that individualized notice and an opportunity to be heard are the touchstones of due process. See *Mullane* v. *Central Hanover Bank and Trust Co*, 339 U.S. 306 (1950).

Furthermore, the Court has admonished that "the considerations which may induce a court [to proceed to judgment in a class action], despite a technical defeat of parties, may differ from those which must be taken into account in determining whether the absent parties are bound by the decree or, if it is adjudged that they are, in ascertaining whether such an adjudication satisfies the requirements of due process." *Hansberry* v. *Lee*, 311 U.S. at 42. Therefore, the fact that a case may proceed as a class action without individual notice to absent parties does not mean that absent parties who have not received notice are bound by the decree.

Moreover, it is important that in most challenges to title VII decrees, the challengers will not be members of the plaintiff class in the original action. Rather, they will generally have interests antithetical to those of the plaintiff class. It, therefore, makes little sense to bind them through analogy to a theory by which members of a plaintiff class may bind absent members of the same class.

We, therefore, remain convicted that in the overwhelming majority of cases individualized notice and an opportunity to be heard remain essential to due process. We, therefore, oppose any attempt to overturn *Martin* v. *Wilks* and to extinguish the rights of absent individuals.

Question. You reject the "notice to interested persons" formulation proposed in section 6. Can you envision any method of providing for the finality of litigated or consent judgments that you would not reject for the same reasons? If so, please explain. Do you reject finality of such judgments as a worthwhile objective?

Answer. As stated above, we strongly believe that *Martin* v. *Wilks* is correct and that the scheme recognized by the Court for permitting affected individuals to protect their rights comports with due process and is the fairest that we can think of. We certainly consider preserving the finality of judgments to be a worthwhile goal. Indeed, in the title VII context, the Federal Government is often the defendant and would benefit from a statutory scheme that insulated title VII decrees from collateral attack. But finality is not the sole interest at stake. It is a goal to be served only insofar as it is consistent with due process and simple fairness to aggrieved individuals. The interest in finality cannot be used as an insurmountable barrier to block meritorious claims from court, particularly when the aggrieved individuals have acted in a timely fashion.

The second set of questions was submitted by Senator Hatch.

Question. What impact does Section 13 of S. 2104 have on your concern that this bill lead to quota hiring by employers?

Answer. Finally, Senator Hatch asks whether section 13 of the bill has any impact on our concern that the bill will lead to quota hiring. We frankly do not understand the full import of section 13 of the bill and think it needs clarification before its impact can be debated intelligently. To the extent that it attempts to insulate court orders and affirmative action programs from meaningful challenge, it would surely add to our fears that employers would resort to quota hiring. In all events, the section does not address the bill's pronounced tendency in sections 4 and 6 to push employers into quota-hiring and insulate consent decrees containing quotas from challenge, respectively.

Thank you for this opportunity to appear before the committee and to respond to these questions. I will be glad to assist the committee in any way that I can in its deliberations regarding this legislation.

Sincerely,
Donald B. Ayer, Deputy Attorney General

The CHAIRMAN. Thank you very much.

The second panel: Two distinguished former chairs of the Equal Employment Opportunity Commission, Eleanor Holmes Norton chaired the commission during the Carter administration; she is currently professor of law at Georgetown University Law Center;

And William Brown chaired the commission during the Nixon administration. He is currently a member of the law firm Schnader, Harrison, Segal and Lewis, of Philadelphia. He is testifying over in the House at present; but we expect him here shortly.

Ms. Norton, we are very glad, as always, to welcome you here as well as to the Judiciary Committee, where in both rooms you have testified often. We are always the better for your testimony. We are glad to have you here.

STATEMENT OF HON. ELEANOR HOLMES NORTON, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, DC, AND HON. WILLIAM BROWN, III, SCHNADER, HARRISON, SEGAL AND LEWIS, PHILADELPHIA, PA

Ms. NORTON. Thank you, Senator Kennedy. Thank you, Senator Thurmond. I will excerpt from my testimony.

The CHAIRMAN. All the statements will be included in their entirety in the record.

Ms. NORTON. I am here today in support of the Civil Rights Act of 1990 but to testify specifically on the issue of full redress for victims of intentional discrimination in the workplace. I thank you for providing an opportunity for me to express my views on an important aspect of this landmark legislation.

I shall testify today regarding three provisions of the proposed Civil Rights Act. First, I will discuss the provision of the act intended to restore section 1981 to the position it occupied in Federal antidiscrimination law before the U.S. Supreme Court's decision last term in *Patterson* v. *McLean Credit Union.*

Second, I will address the need to allow the victims of intentional employment discrimination to seek and, in appropriate cases, obtain compensatory and punitive damages.

Finally, I will discuss the urgent need for legislative correction of the U.S. Supreme Court's decision in *Price Waterhouse* v. *Hopkins.*

I believe that passage of this legislation is essential to cure defects in the laws prohibiting discrimination in employment, to correct the erroneous interpretation of the laws which you Senators have so carefully developed to combat discrimination in the Na-

tion's workplace, and to advance the opportunity for every American in an environment free of taint of unlawful discrimination.

Historically, both Title VII of the Civil Rights Act of 1974 and section 1981 have afforded important remedial opportunities for victims of employment discrimination in its various forms. As Chief Justice Rehnquist observed in *Johnson* v. *Railway Express Agency*, the remedies available under title VII and under section 1981, although related and although directed to most of the same ends, are separate, distinct, and independent. Section 1981 has, in addition, been relied upon by victims of discrimination outside the employment setting.

During the 1987 and 1988 terms, the U.S. Supreme Court reviewed an appeal brought by Brenda Patterson, a black female victim of employment discrimination. Ms. Patterson sought the Court's review of an appellate Court decision which held that 42 U.S.C. 1981 afforded no protection to victims of racial discrimination in the workplace.

The U.S. Supreme Court affirmed the decision of the lower court, holding that section 1981's prohibition against discrimination, and I quote, "extends only to the formation of a contract but not to the problems that may arise later from the conditions of continuing employment."

Thus, section 1981, which the U.S. Supreme Court previously recognized as a remedy against discrimination in employment on the basis of race, to use its words, and applied in racial harassment cases, was reduced by the majority in *Patterson* to a nullity for victims of workplace racial harassment.

The *Patterson* decision had immediate, devastating effects on pending employment discrimination cases. Section 1981 cases pending in the lower Federal Courts were dismissed at a rate of nearly one case per day between June 15, 1989, and November 1, 1989.

For example, Terrell McGinnis, an African-American man, worked for 5 years under abominable conditions for an Alabama-based company. At the conclusion of his opinion, the trial judge observed that McGinnis, and I am quoting, "has suffered many more racial indignities at the hands of the company than any one citizen should be called upon to bear in a lifetime."

The litany of discriminatory acts Mr. McGinnis endured included being removed from a foreman position solely because of his employer's belief that, "It just don't look right to have a nigger foreman," being forced to clean restrooms and to prevent black visitors from using the office restrooms, having a gun pointed to his head shortly after he was called a nigger and a black SOB by his supervisor, being physically abused by his employer at least twice, and during a business trip lunch break, having his supervisor place his sandwich on the floor and tell him to retrieve it, saying, "Here you go, my nigger."

This horrid spectacle occurred in a restaurant whose patrons, with the exception of Mr. McGinnis, were all white.

The harm resulting to Mr. McGinnis from his employer's deplorable conduct and the need to deter future acts of this kind by the employer are obvious. Nevertheless, Mr. McGinnis' injuries may never be remedied, and the employer's conduct may remain unchecked because the Court of Appeals for the 11th Circuit has re-

manded the case to the District Court "for further proceedings consistent with *Patterson*."

The Court of Appeals directed the trial judge to "reconsider its judgment and award of damages," since "claims of harassment and discriminatory work conditions are no longer actionable under section 1981."

Similarly, in *Long* v. *Hilton Hotels Corp.*, plaintiff Bunny Kishara, a woman of Hawaiian and Chinese ancestry, endured a workplace rife with anti-Asian racial slurs during her tenure as an executive secretary. Her supervisor told her that he "had to have the only secretary who does the hula," and his other racist commentary included statements that locals tend to be slow, lazy, and laid-back and are incapable of being supervisors." The trial judge, applying *Patterson*, held that there is no cognizable claim under section 1981 to challenge such conduct.

There can be little doubt that intentional discrimination in the form of racial harassment is one of the lingering impediments to the achievement of equal employment opportunities. Nooses have been displayed in the workplace to intimidate and harass black employees. Racial slurs and epithets are uttered freely in some workplaces, and supervisors impose racially disparate assignments or more closely supervise employees on the basis of race and on account of color.

These and similar actions are, in the words of one district judge, "contemptible, but after *Patterson*, not actionable, at least not under section 1981."

Other forms of intentional discrimination persist in the workplace as well. For example, a series of complaints filed by the New York attorney general and the corporation counsel of the City of New York challenged pervasive discrimination among employment agencies in New York City. The complaints filed in these cases allege that the agencies regularly racially coded applications, honored clients' requests to send only white applicants to interviews, and misled nonwhite applicants about the existence of vacancies in particular companies and the availability of advertised positions.

I urge this committee to adopt the proposed legislation, which guarantees that the formation, performance, modification, and termination of every contract and the enjoyment of all benefits, terms and conditions of each contractual relationship shall be unimpaired by discrimination on account of race and color.

Moving to conforming title VII and section 1981 in their remedial provisions, section 1981 was Congress' attempt to respond to the horrors encountered by recently freed slaves in the wake of the Civil War. In the next century, societal awareness and disapproval of other forms of discrimination, most notably gender and religious discrimination increased, and the national commitment to eradicate impediments to the full enjoyment of employment rights by all persons regardless of race, national origin, gender, or religion led Congress to renew its efforts in this area.

Nearly a century after its original attempt to eradicate racial discrimination in the economic sphere, Congress revisited the subject of equal employment opportunity and enacted the Civil Rights Act of 1964. Now the remedial provisions of title VII and section

1981 should be reconciled, and section 7 of the proposed legislation will accomplish this.

Victims of all forms of intentional discrimination must all be afforded complete relief. Employers must be deterred from engaging in purposeful discrimination against their employees. The historic anomaly between remedies available to racial discrimination victims and persons discriminated against due to their religion or gender should be eliminated, and it can be through the passage of Section 7 of S. 2104.

Patterson effectively denies victims of discriminatory harassment in the workplace and many other forms of intentional discrimination the opportunity to obtain compensation for the real injuries they suffer as a result of their employer's deplorable conduct. Title VII provides only equitable relief in the form of back pay, reinstatement, front pay, restoration of benefits or seniority, and injunctive relief. The *Patterson* decision limits its victims to the often inadequate relief afforded by title VII.

Several important differences have led employment discrimination victims to opt for one set of remedies or to pursue both title VII and section 1981 remedies. Prevailing section 1981 plaintiffs are entitled to compensatory and punitive damages. But title VII affords only equitable remedies, with a 2-year limitation on the back pay that a prevailing plaintiff can receive.

A title VII plaintiff must file an administrative charge and follow strict administrative procedures before filing the civil action in Federal Court. However, pursuing the title VII claim also provides access to investigatory and conciliation resources of the EEOC that are unavailable to plaintiffs proceeding solely under section 1981.

A number of jurisdictional and strategic factors may have influenced or determined plaintiffs' choices between the two antidiscrimination statutes. A jury trial is available in section 1981 cases, but is unavailable in title VII cases. The title VII statute of limitations is less generous than section 1981 in many jurisdictions, and section 1981 has sometimes afforded a remedy to employment discrimination victims who were unaware of title VII's severely limited charge filing requirements and missed the opportunity to proceed under title VII.

. Employers of any size are covered by section 1981, but title VII excludes small employers from its reach. Title VII allows proof of discrimination based upon a demonstration of either disparate treatment or disparate impact, but section 1981 reaches only intentionally discriminatory conduct.

Finally, some plaintiffs, most notably victims of employment discrimination based upon gender or religion, are only protected by title VII and may not opt to sue under section 1981.

While legislative restoration of the losses sustained on account of the *Patterson* decision as a necessary measure, it is insufficient by itself to ensure a workplace free from discrimination based on race, national origin, religion, and gender.

One of the anomalies of current Federal antidiscrimination law is the availability of damages remedies for some, but not all, victims of unlawful discrimination in the workplace. Specifically, racial and ethnic minorities can, even after *Patterson*, rely upon

section 1981 to remedy some discriminatory acts by their employers and, if they prevail, obtain the legal remedies of compensatory and punitive damages as well as equitable relief, such as back pay.

If, however, these same victims challenge the identical conduct under title VII alone, either by choice or by default in the wake of *Patterson*, they may no longer obtain legal remedies and are limited to title VII's equitable remedies.

Victims of discrimination based on gender or religion have no access at all to legal remedies. Section 7 of the proposed bill, which provides for damages in cases of intentional discrimination against any members of a class protected by title VII, can correct this anomaly and thereby advance the Nation's progress toward full equality in the workplace.

The experiences of working women highlight the difficulties that result when sexual harassment pollutes the working environment or racial and sex biases converge and result in a pattern of harassment on account of gender and race of employees. The reported decisions also demonstrate the need to conform the remedial provisions of title VII and section 1981 to ensure full compensation to all victims of intentional employment discrimination and to deter employers from engaging in such conduct.

Women who challenge sexually hostile working environments in title VII litigation receive no financial compensation for their injuries whether the injuries are physical or emotional. Under title VII, damages for sexual harassment never have been available, and back pay is available only if a woman loses a job or a promotion. A woman forced to simply endure sexual advances without loss of employment or promotion opportunities receives no compensation for her injuries, and her employer is not subject to deterrent penalties.

A review of only a few reported decisions recounting women's experiences in hostile workplaces readily illustrates the urgent need for redress.

Denita Council, a black woman fire fighter, was among the first female applicants for employment with the Topeka Fire Department. She filed a complaint in Federal Court alleging that her supervisor and coworkers referred to her as a "nigger," "an aggressive black bitch," and that she was both racially and sexually harassed at work. She used section 1981, among other remedies. Applying *Patterson*, the Court entered summary judgment for defendant on the section 1981 claim. The Court denied defendant's motion for summary judgment on the title VII claim founded upon this same conduct.

As a practical matter, however, Ms. Council's title VII victory may be illusory. The Court notes elsewhere in its opinion that Ms. Council received all the promotions and pay increases to which she was entitled. Thus, even if she prevails in her challenge to defendant's allegedly discriminatory acts, she is eligible only for injunctive relief—but no money damages.

An order to her employer to treat her with the dignity she deserves and the costs of bringing her suit are astonishingly inadequate remedies for such discriminatory workplace conduct.

Helen Brooms, an African American woman, was hired to work as an industrial nurse in the Regal Tube Company. She worked for the company for 16 months and endured numerous explicit racial

and sexual remarks throughout her employment as well as her supervisor's sexual advances.

Her supervisor showed her a pornographic photograph depicting interracial sodomy and suggested that the photograph illustrated her employment requirements.

On another occasion he showed her a racist pornographic picture involving bestiality and threatened that the picture depicted how she was going to end up.

When Ms. Brooms tried to take a photocopy of the bestiality picture, her supervisor grabbed her arm and threatened to kill her if she moved. She threw the coffee on him and ran away, screaming and falling down a flight of stairs as she fled.

As a result of this abuse, Ms. Brooms was temporarily disabled and severely depressed. Applying *Patterson*, the Court dismissed Ms. Brooms's section 1981 claim. However, if affirmed, an award of back pay based upon a constructive theory asserted under title VII is possible. Ms. Brooms received only her lost wages for a 2-year period and obtained no compensation for medical expenses and other costs associated with the serious physical and psychological injury caused by her employer's unlawful actions.

Let me move now finally to employer liability for discriminatory acts in mixed-motive cases. I would like to present testimony regarding section 4 of the proposed legislation.

Section 4 of S. 1204 provides that proof that race, color, religion, sex, or national origin was a motivating factor for any employment practice shall constitute a violation of title VII in cases where other factors also influenced the challenged employment practice.

[The prepared statement of Ms. Norton follows:]

PREPARED STATEMENT OF ELEANOR HOLMES NORTON

Good morning Senators. My name is Eleanor Holmes Norton and I am a professor of law at Georgetown University Law Center. I was Chair of the Equal Employment Opportunity Commission from 1977 to 1981. I am here today in support of the Civil Rights Act of 1990,[1] and to testify specifically on the issue of full redress for victims of intentional discrimination in the workplace. I thank you for providing an opportunity for me to express my views on an important aspect of this legislation.

I shall testify today regarding three provisions of the proposed Civil Rights Act. First, I will discuss the provision of the Act intended to restore section 1981 to the position it occupied in federal anti-discrimination law before the United States Supreme Court's decision last term in *Patterson* v. *McLean Credit Union*, 105 L.Ed.2d 132 (1989). Second, I will address the need to allow the victims of intentional employment discrimination to seek and, in appropriate cases, obtain compensatory and punitive damages. Finally, I will discuss the need for legislative correction of the U.S. Supreme Court's decision in *Price Waterhouse* v. *Hopkins*, 104 L.Ed.2d 268 (1989).

I believe that passage of this legislation is essential to cure defects in the laws prohibiting discrimination in employment; to correct the erroneous interpretation of the laws which you, Senators, have so carefully developed to combat discrimination in the nation's workplaces; and to advance the opportunity for every American to work in an environment free of the taint of unlawful discrimination. By providing full redress to the victims of lingering prejudices attributable to the race, color, gender, religion or national origin of employees and applicants for employment, and by seriously sanctioning those employers who run afoul of the anti-discrimination laws, the proposed legislation will deter discrimination in the workplace and speed the nation towards the goal of eliminating unlawful discrimination in employment.

Full Redress of Intentional Discrimination in 1981

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[1] S. 2104, 101st Cong., 2d Sess.

In 1866 the United States Congress enacted a Civil Rights Act in response to post-Emancipation legal and extra-legal efforts to oppress the freed men and women. The Civil Rights Act of 1866 was intended to " 'give effect to th[e Thirteenth Amendment] and secure to all persons within the United States practical freedom.' " [2] The Civil Rights Act's Senate sponsor stated that the legislation would "break down all discrimination between black men and white men." [3]

The preservation of 42 U.S.C. section 1981 ("section 1981") as a viable, effective remedy for employment discrimination is more than a sentimental gesture. Historically, both Title VII of the Civil Rights Act of 1964 ("Title VII") and section 1981 have afforded important remedial opportunities for victims of employment discrimination in its various forms. As Chief Justice Rehnquist observed in *Johnson* v. *Railway Express Agency*, "the remedies available under Title VII and under section 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent." 421 U.S. 454, 461 (1975). Section 1981 has, in addition, been relied upon by victims of discrimination outside of the employment setting. For example, section 1981 was used to attack racially discriminatory private schools,[4] and has also been effective in the effort to eliminate barriers to residential integration.[5] The need for effective means to deter, and full legal remedies to redress intentional discrimination in contractual relationships remains urgent.

During the 1987 and 1988 terms, the United States Supreme Court reviewed an appeal brought by Brenda Patterson, a black female victim of employment discrimination.[6] Ms. Patterson sought the Court's review of an appellate court decision which held that 42 U.S.C. section 1981 afforded no protection to victims of racial harassment in the workplace.[7] The United States Supreme Court affirmed the decision of the lower court, holding that Section 1981's prohibition against discrimination "extends only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment," and that the law affords mere "protection of a legal process . . . that will address and resolve contract-law claims without regard to race." [8]

Although Ms. Patterson alleged that she "was subjected to racial slurs; given more work than white employees and assigned the most demeaning tasks; passed over for promotion, not informed of promotion opportunities, and not offered training for higher level jobs; denied wage increases routinely given other employees; and singled out for scrutiny and criticism," [9] a majority of the U.S. Supreme Court held that such harassment in the workplace "involves [n]either a refusal to make a contract . . . [n]or the impairment of [t]he ability to enforce . . . established contract rights." [10]

Thus section 1981, which the U.S. Supreme Court previously recognized as "a federal remedy against discrimination in . . . employment on the basis of race [11] and applied in racial harassment cases,[12] was reduced by the majority opinion in *Patterson* to a nullity for victims of workplace racial harassment. Where it had been possible for victims of intentional racially motivated employment discrimination to rely upon either or both of the "separate, distinct, and independent" procedural and remedial avenues afforded by section 1981 and Title VII,[13] victims of most forms of

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[2] *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 431 (1968) ((*quoting*) Cong. Globe, 39th Cong., 1st Sess. at 474) (Remarks of Senator Trumbull). The Act is now codified at 42 U.S.C. § § 1981 and 1982.

[3] Cong. Globe, 39th Cong., 1st Sess. at 599 (Remarks of Senator Trumbull).

[4] *E.g.*, *Runyon* v. *McCrary*, 427 U.S. 160 (1976).

[5] *See e.g. Gore* v. *Turner*, 563 F.2d 159 (5th Cir. 1977); *but see Ragin* v. *The New York Times Co.*, 1989 U.S. Dist. Lexis 14980 (S.D.N.Y. 1990) (dismissing section 1981 challenge to newspaper's publication of discriminatory pictorial real estate advertisements on ground that *Patterson* v. *McLean Credit Union*, 105 L.Ed.2d 132 (1989) precludes application of section 1981 to discriminatory conduct alleged).

[6] *Patterson* v. *McLean Credit Union*, 491 U.S. ——, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989).

[7] *Patterson* v. *McLean Credit Union*, 805 F.2d 1143 (4th Cir. 1986). The Court of Appeals distinguished Title VII's prohibition against discrimination in the "terms, conditions, or privileges of employment" from "section 1981's more narrow prohibition of discrimination in the making and enforcing of contracts" and concluded that only conduct or events that "go to the very existence and nature of the contract" were actionable under section 1981. 805 F.2d 1143, 1145.

[8] *Patterson* v. *McLean Credit Union*, 105 L.Ed.2d 132, 15051.

[9] *Id.* at 174 (Brennan, J., concurring in the judgment in part and dissenting in part).

[10] 105 L.Ed.2d 132, 152.

[11] *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 459–60 (1975)

[12] *See e.g., Goodman* v. *Lukens Steel Co.*, 580 F.Supp. 1114 (E.D. Pa. 1984) liability judgment against defendant *aff'd* 777 F.2d 113 (3d Cir. 1985) *aff'd in relevant part* 96 L.Ed.2d 572, 587 (1987).

[13] *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 461 (1975).

racial discrimination in employment are now forced by the Court's decision in *Patterson* to forego section 1981 and pursue only the relief afforded to them under Title VII. I hope, through this testimony, to illuminate the serious consequences flowing from this decision in numerous individual employment discrimination cases and to demonstrate the urgent need for the passage of section 11 of this legislation.

The *Patterson* decision had immediate, devastating effects on pending employment discrimination claims. Section 1981 cases pending in the lower federal courts were dismissed at a rate of nearly one case per day between June 15, 1989 and November 1, 1989.[14] The discrimination victims who filed these suits are, in the wake of the *Patterson* decision, left without a remedy for the serious discriminatory acts that they have endured. Your constituents have been, and will continue to be injured by this decision in inestimable ways unless you act immediately to correct the Court's narrow interpretation of this important law.

Terrell McGinnis, an African-American man, worked for five years under abominable conditions for an Alabama based company. At the conclusion of his opinion, the trial judge observed that McGinnis "has suffered many more racial indignities at the hands of the Company than any one citizen should be called upon to bear in a lifetime." [15] The litany of discriminatory acts Mr. McGinnis endured included being removed from a foreman position solely because of his employer's belief that "it just don't [sic] look right . . . to have a nigger foreman"; being forced to clean restrooms and to prevent black visitors from using the office restrooms; having a gun pointed at his head shortly after he was called a "nigger" and "black s-o-b" by his supervisor; being physically abused by his employer at least twice; and, during a business trip lunch break, having his supervisor place his sandwich on the floor and tell him to retrieve it, saying "Here you go my nigger." This horrid spectacle occurred in a restaurant whose patrons, with the exception of McGinnis, were all white.[16]

The harm resulting to Mr. McGinnis from his employer's deplorable conduct and the need to deter future acts of this kind by the employer are obvious. Nevertheless, Mr. McGinnis' injuries may never be remedied and the employer's conduct may remain unchecked because the Court of Appeals for the Eleventh Circuit, has remanded the case to the district court "for further proceedings consistent with *Patterson*." [17] The Court of Appeals directed the trial judge to "reconsider its judgment and award of damages" since "claims of harassment and discriminatory work conditions are no longer actionable under Section 1981." [18]

Similarly in *Leong* v. *Hilton Hotels Corp.*, 50 FEP Cas. 738 (D. Hawaii 1989), plaintiff Bunny Kishara, a woman of Hawaiian and Chinese ancestry, endured a workplace rife with anti-Asian racial slurs during her tenure as an executive secretary. Her supervisor told her that he "ha[d] to have the only secretary who does the hula," and his other racist commentary included statements that "locals tend to be slow, lazy and laid back" and "[a]re incapable of being supervisors." [19] The trial judge, applying *Patterson*, held that there is "no cognizable claim under section 1981" to challenge such conduct. 50 FEP Cas. 738, 741.

Patricia M. Carroll, an African-American woman, obtained an award of $198,950 in actual and punitive damages following a jury trial of her intentional discrimination and constructive discharge claims against her former employer.[20] However, after the trial court's entry of judgment, the *Patterson* decision was announced. As a result, the trial court held that Ms. Carroll was no longer entitled to the damages assessed by the jury to compensate her for her pain, suffering, physical and emotional distress. In addition, the court vacated the punitive damage award assessed against the employer. Incredibly, although the court vacated $144,950 of the damages, including the sizable punitive damage award,[21] it stated that its decision would "not allow an employer guilty of racial discrimination to go unpunished, would not significantly reduce the deterrent effect of anti-discrimination statutes, and would not bar compensation of [the] aggrieved plaintiff[]." [22]

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[14] NAACP Legal Defense and Education Fund, Inc., "The Impact of *Patterson* v. *McLean Credit Union*" 4 (Nov. 20, 1989).

[15] *McGinnis* v. *Ingram Equipment Company, Inc.*, 685 F. Supp. 224, 228 (N.D. Ala. 1988) *vacated and remanded* 888 F.2d 109 (11th Cir. 1989).

[16] McGinnis v. Ingram Equipment Co.. Inc. 685 F. Supp. 224, 225–26 (N.D. Ala. 1988).

[17] *McGinnis* v. *Ingram Equipment Co.*, 888 F.2d 109, 111 (11th Cir. 1989).

[18] *Id.*

[19] 50 FEP Cas. 738, 739 (D. Hawaii 1989).

[20] *Carroll* v. *General Accident Insurance Co. of America*, 891 F.2d 1174, 1175 (5th Cir. 1990).

[21] Of the remaining $54,000 award, $20,000 was designated for attorneys' fees and expenses, leaving Ms. Carroll $34,000 of the original award.

[22] *Carroll* v. *General Accident Insurance Co. of America*, 891 F.2d 1174, 1176.

Joyce Malekian sued her employer on account of an alleged "pattern of abusive and racially derogatory remarks directed at [her]", and her employer's repeated exhibitions of racial prejudice, inquiries about the " 'color' " of job applicants, and suggestions that Black employees were thieves.[23] She asserted Title VII, section 1981 and state tort claims. Following *Patterson* the district court dismissed Malekian's section 1981 claim, concluding that retroactive application of the *Patterson* rule "w[ould] not impose on plaintiff injustice or hardship, since she may still pursue her claim under Title VII." Finally, the court deprived Ms. Malekian of her remaining avenue to obtain full redress through legal remedies and confined her to obtaining equitable relief available under Title VII by "declin[ing] to exercise pendent jurisdiction over . . . [her state tort] claim." [24] The Court explained that "consideration of th[e] state law claim would interfere with the purpose and remedies Congress provided for in Title VII." [25] Thus, Ms. Malekian, and perhaps others, may face not only the dismissal of their section 1981 claims,[26] but also factually supportable pendent state claims which afford them their only opportunity to obtain more complete compensation for their injuries and to deter future employer misconduct through the award of punitive damages in appropriate cases. It is remarkable that a federal court would take such action in supposed furtherance of the aims of Title VII.[27]

There can be little doubt that intentional discrimination, in the form of racial harassment, is one of the lingering impediments to the achievement of equal employment opportunities. Nooses have been displayed in the workplace to intimidate and harass Black employees; [28] racial slurs and epithets are uttered freely in some workplaces; [29] and supervisors impose racially disparate assignments,[30] or more closely supervise employees on account of their race or color.[31] These and similar actions are, in the words of one district judge "contemptible . . . [but a]fter *Patterson*, . . . not actionable. At least, not under section 1981." [32]

Other forms of intentional discrimination persist in the workplace as well. For example, a series of complaints filed by the New York Attorney General and the Corporation Counsel of the City of New York challenge pervasive discrimination among employment agencies in New York City.[33] The complaints filed in these cases allege that the agencies regularly racially coded applications,[34] honored client requests to send only white applicants to interviews,[35] and misled non-white applicants about the existence of vacancies in particular companies and the availability of advertised positions.[36]

In light of these conditions, we must advance, not retreat from our efforts to eradicate degrading and unjust discriminatory practices from the nation's workplaces. The *Patterson* decision, however, clearly undermines this effort. I urge this Committee to adopt the proposed legislation which guarantees that the formation, performance, modification and termination of every contract, and the enjoyment of all benefits, terms and conditions of each contractual relationship shall be unimpaired by discrimination on account of race or color.

Conforming Title VII and Section 1981 Remedial Provision

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[23] *Malekian* v. *Pottery Club of Aurora, Inc.*, 724 F.Supp. 1279, 1280 (D. Colo. 1989).

[24] *Id.* at 1281.

[25] *Id.* at 1281–82.

[26] For a thorough discussion of the types of claims dismissed by the federal courts since the *Patterson* decision was announced *see* NAACP Legal Defense and Education Fund, Inc., "The Impact of *Patterson* v. *McLean Credit Union*" (Nov. 20, 1989).

[27] *See also* National Women's Law Center, "Title VII's Failed Promise: The Impact of the Lack of a Damages Remedy" 24–28 (1990) (discussing inadequacy of state remedies to redress acts of discrimination and harassment).

[28] *See e.g. Taylor* v. *Jones*, 653 F.2d 1193, 1198 (8th Cir. 1981); *Kitchen* v. *Firestone Steel Products Co.*, Nos. 12190–EN, 15389–EM (Mich. Civ. Rts. Comm. 1984); *see generally* M.Denis, "Race Harassment Discrimination: A Problem That Won't Go Away?" 10 Empl. Rel. L.J. 415.

[29] *See e.g. Hunter* v. *Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986).

[30] *See e.g. McGinnis* v. *Ingram Equipment Co.*, 685 F. Supp. 224 (N.D. Ala. 1988).

[31] *See e.g. Claiborne* v. *Illinois Central R.R.*, 583 F.2d 143 (5th Cir. 1978) cert. denied 442 U.S. 934 (1979).

[32] *Dangerfield* v. *Mission Press*, 50 FEP Cas. 1171, 1172 (N.D. Ill. 1989).

[33] *People* v. *Dante Personnel Services Inc.*, No. 89–6937NGC (S.D.N.Y. 1990); *People* v. *Norell Corporation*, (S.Ct.N.Y., complaint filed February 20, 1990) (index number not assigned); *People* v. *Mahony Placement Service. Inc.*, (S.Ct.N.Y., complaint filed Sept. 28, 1989) (index number not assigned); *People* v. *Dover Employment Agency, Inc.*, (S.Ct.N.Y., complaint filed Sept. 28, 1989) (index number not assigned).

[34] *See People* v. *Norrell, id.*, Complaint ¶ 23–24.

[35] *See Mahony, supra* note 34, Complaint, ¶ 18.

[36] *Norrell, supra* note 34, Complaint, ¶ 25.

Section 1981 was Congress' attempt to respond to the horrors encountered by recently freed slaves in the wake of the Civil War. In the next century, societal awareness and disapproval of other forms of discrimination—most notably gender and religious discrimination—increased, and the national commitment to eradicate impediments to the full enjoyment of employment rights by all persons, without regard to race, national origin, gender, or religion led Congress to renew its efforts in this area.

Nearly a century after its original attempt to eradicate racial discrimination in the economic sphere, Congress revisited the subject of equal employment opportunity and enacted the Civil Rights Act of 1964. Title VII of that Act, codified at 42 U.S.C. § § 2000e *et seg.*, thus became the principal federal statutory protection against employment discrimination on account of race, color, religion, sex or national origin.

Again, in 1972, Congress reaffirmed its commitment to eradicating racial, religious, and gender-based discrimination in the workplace by enacting the Equal Employment Opportunity Act of 1972. The 1972 Act extended the coverage of Title VII to previously uncovered employers and relaxed procedural requirements for filing employment discrimination complaints based upon Title VII of the Civil Rights Act of 1964. Nevertheless, 42 U.S.C. section 1981 remained an important "weapon[] to combat unlawful employment discrimination in the private as well as the public sector." [37]

The remedial provisions of Title VII and section 1981 should be reconciled, and Section 7 of the proposed legislation will accomplish this. Victims of all forms of intentional discrimination must be afforded complete relief. Employers must be deterred from engaging in purposeful discrimination against their employees. The historic anomaly between the remedies available to racial discrimination victims and persons discriminated against due to their religion or gender should be eliminated, and it can be through the passage of Section 7 of S. 2104.

Patterson effectively denies victims of discriminatory harassment in the workplace, and many other forms of intentional racial discrimination, the opportunity to obtain compensation for the real injuries they suffer as a result of their employers' deplorable conduct. Title VII provides only equitable relief in the form of back pay, reinstatement, front pay, restoration of benefits or seniority, and injunctive relief.[38] The *Patterson* decision has removed section 1981 from the "arsenal of weapons to combat" [39] workplace racial harassment, and limits its victims to the often inadequate relief afforded by Title VII. As the National Women's Law Center observed in its recent study of the impact of Title VII's failure to provide damages to victims of discrimination:

> Title VII often fails to achieve its underlying goals, as it leaves many victims of employment discrimination without remedies for their proven injuries and allows many discriminatory employers to avoid any meaningful liability. . . . [V]ictims of harassment . . . have no Title VII remedy for many grievous injuries—often including extensive medical, psychological and other emotional injuries—they suffer.[40]

Several important differences have led employment discrimination victims to opt for one set of remedies, or to pursue both Title VII and section 1981 remedies.[41] Prevailing section 1981 plaintiffs are entitled to compensatory and punitive damages, but Title VII affords only equitable remedies, with a two-year limitation on the back pay that a prevailing plaintiff can receive.[42] A Title VII plaintiff must file

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[37] *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 468 (1975) (Marshall, J., concurring in part and dissenting in part).

[38] Thus, employment discrimination victims covered only by Title VII—specifically women and persons discriminated against on account of their religious beliefs—have never been able to obtain compensatory or punitive damages, regardless of how objectionable their employers' conduct might be. In some cases this has deprived victims of any meaningful federal remedy. *See e.g. Huddleston* v. *Roger Dean Chevrolet, Inc.*, 845 F.2d 900 (11th Cir. 1988) (holding that sexual harassment victim may be entitled to recover nominal damages and attorney's fees only, and no backpay since her "evidence of lost commissions was too vague").

[39] *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 468 (Marshall, J., concurring in part and dissenting in part).

[40] National Women's Law Center, *Title VII's Failed Promise: The Impact of the Lack of a Damages Remedy* 8 (1990).

[41] *See Patterson* v. *McLean Credit Union*, 105 L.Ed.2d 132, 173 (1989) (Brennan, J., concurring in part and dissenting in part) (discussing differences between remedial and procedural provisions of Title VII and section 1981).

[42] *Johnson* v. Railway Express Agency, 421 U.S. at 460. also 42 U.S.C. § 2000e–5(g).

an administrative charge and follow strict administrative procedures before filing a civil action in federal court; however, pursuing a Title VII claim also provides access to investigatory and conciliation resources of the Equal Employment Opportunity Commission that are unavailable to plaintiffs proceeding solely under section 1981.[43]

A number of jurisdictional and strategic factors may have influenced or determined plaintiffs' choices between the two anti-discrimination statutes. A jury trial is available in section 1981 cases, but is unavailable in Title VII cases.[44] The Title VII statute of limitations is less generous than the section 1981 statute of limitations in many jurisdictions,[45] and section 1981 has sometimes afforded a remedy to employment discrimination victims who were unaware of Title VII's severely limited charge filing requirements, and missed the opportunity to proceed under Title VII. Employers of any size are covered by section 1981, but Title VII excludes small employers from its reach.[46] Title VII allows proof of discrimination based upon a demonstration of either disparate treatment[47] or disparate impact,[48] but section 1981 reaches only intentionally discriminatory conduct. Finally, some plaintiffs—most notably victims of employment discrimination based upon their gender or religion—are only protected by Title VII, and may not opt to sue under section 1981.

While legislative restoration of the losses sustained on account of the *Patterson* decision is a necessary measure, it is insufficient by itself to ensure workplaces free of all discrimination based on race, national origin, religion, and gender. One of the anomalies of current federal antidiscrimination law is the availability of damages remedies for some, but not all, victims of unlawful discrimination in the workplace. Specifically, racial and ethnic minorities can, even after *Patterson*, rely upon section 1981 to remedy some discriminatory acts by their employers and if they prevail, obtain the legal remedies of compensatory and punitive damages, as well as equitable relief such as backpay. If, however, these same victims challenge the identical conduct under Title VII alone, either by choice or by default in the wake of *Patterson*, they may no longer obtain legal remedies and are limited to Title VII's equitable remedies. Victims of discrimination based on gender or religion have no access at all to legal remedies.

Whatever the rationale for creating disparate remedial provisions for victims of intentional discrimination was historically, I believe that the time has come to eliminate this significant discrepancy. Section 7 of the proposed bill, which provides for damages in cases of intentional discrimination against any member(s) of a class protected by Title VII, can correct this anomaly, and thereby advance the nation's progress towards full equality in the workplace.

The experiences of working women highlight the difficulties that result when sexual harassment pollutes the working environment, or racial and sexual biases converge and result in a pattern of harassment on account of the gender and race of employees. The reported decisions also demonstrate the need to conform the remedial provisions of Title VII and section 1981 to ensure full compensation to all victims of intentional employment discrimination, and to deter employers from engaging in such conduct.

Women who challenge sexually hostile working environments through Title VII litigation receive no financial compensation for their injuries, whether the injuries are physical or emotional. Under Title VII, damages for sexual harassment have never been available, and back pay is available only if a woman loses a job or promotion; a woman forced to simply endure sexual advances without loss of employ-

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[43] *Patterson*, 105 L.Ed.2d at 173 and n.15.

[44] Comment, "Developments in the Law—Section 1981," 15 Harv. Civ. R-Civ. L. L. Rev. 33, 246–50 (1980. *But see Beesley* v. *Hartford Fire Ins. Co.* 51 FEP Cas. 27 (N.D. Ala. 1989) (holding that jury trial is available upon demand of either party in Title VII action). Section 7 of S. 2104 would permit jury trial upon demand of either party in the bill's newly created Title VII monetary damages actions. This section is intended to promote greater procedural consistency for Title VII and section 1981 claimants.

[45] Title VII requires filing of an administrative charge of discrimination within 180 or 300 days of the date of the alleged discriminatory act, depending upon the state in which the charge is filed. 42 U.S.C. § 2000e–5(e). In section 1981 cases, however, the statute of limitations is determined by reference to the statute of limitations for the analogous state law cause(s) of action. *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656 (1987). Section 6 of S. 2104 would extend the Title VII charge filing period to two years, thereby conforming Title VII's statute of limitations to the more generous filing period for section 1981 claims.

[46] *See e.g. McGinnis* v. *Inaram Equipment Co., Inc.*, 685 F. Supp. 224 and n.1 (N.D.Ala. 1988) (noting that defendant's small company is not an "employer" as defined by Title VII, 42 U.S.C. § 2000e (b)).

[47] *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

[48] *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

ment or promotion opportunities receives no compensation for her injuries, and her employer is not subject to deterrent penalties.[49] A review of only a few reported decisions recounting women's experiences in hostile workplaces readily illustrates why Congress must act to implement more meaningful remedies for all classes of people protected by Title VII, particularly the victims of workplace harassment on account of sex and/or race.[50]

Denita Council, a Black woman firefighter, was among the first female applicants for employment with the Topeka Fire Department.[51] She filed a complaint in federal court alleging that her supervisor and co-workers referred to her as "nigger" and "aggressive black bitch" and that she was both racially and sexually harassed at work. She sought, *inter alia*, remedies under section 1981. Applying *Patterson*, the court entered summary judgment for defendant on the section 1981 claim.[52] The Court denied defendant's motion for summary judgment on the Title VII claim founded upon this same conduct.

As a practical matter, however, Ms. Council's Title VII victory may be illusory. The court notes elsewhere in its opinion that Ms. Council "received all of the promotions and pay increases to which she was entitled." Thus, even if she prevails in her challenge to defendant's allegedly discriminatory acts, she is eligible only for injunctive relief, but no money damages. *Council* v. *City of Topeka*, 1990 U.S. Dist. Lexis 1315 at 4–5, 7 (D.Kan. 1990). "[A]n order to her . . . employer to treat her with the dignity she deserves and the costs of bringing her suit" are astonishingly inadequate remedies for such discriminatory workplace misconduct. *Mitchell* v. *OsAir*, 629 F.Supp. at 643 (N.D. Ohio, 1986).

Patty Baxter and Darla Hall, like many women in the United States, sought more highly compensated employment to support the children they raise alone. Their search took them to a construction company, where they accepted positions as traffic controllers at road construction sites. Hall and Baxter, together with a third woman, Jeannette Tickner, were immediately subjected to sexual harassment at work. Male employees "incessantly referred to the women as 'fucking flag girls,'" touched their thighs and breasts, and made sexual propositions to them. This conduct, and numerous other incidents forced the women to leave their jobs after only four months.[53] Baxter, Hall and Tickner were able to obtain monetary relief for these acts of intentional discrimination only because the state civil rights law permitted recovery of damages.[54] If they had resided elsewhere, however, they may not have been able to obtain such relief. Clearly, "[f]ull vindication of civil rights should not be dependent on a factor as arbitrary as the victim's place of residence."[55] Under existing law however, this is the case.

Theresa Foster, an African-American woman, was the first woman machinist apprentice in her employer's Shops and Crafts Department.[56] She alleged that she was the victim of racial and sexual harassment at work which caused her to seek therapy for emotional problems and forced her to undergo surgery on account of an exacerbated hyperthyroid problem.[57] After ten years of employment, she was fired for violating a work rule which prohibited "insubordinate, quarrelsome, and vicious" employee conduct.[58] Following *Patterson*, the trial court held that plaintiff could only present proof of damages related to the termination of her employment and not the damages caused by the harassment she endured while employed. Thus,

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[49] Since *Patterson* precludes reliance upon section 1981 in racial harassment cases, women generally, and women of color particularly, cannot rely upon federal law to obtain full redress for the harm caused by harassment which they experience. Moreover, there is little to deter employers who wish to engage in such behavior, given the absence of meaningful remedies in many cases.

[50] The National Women's Law Center, citing *Mitchell* v. *OsAir*, 629 F.Supp. 636 (N.D. Ohio, 1986), notes that the lack of damages remedy under Title VII may deter harassment victims from pursuing their claims. *Id.* at 18–19. As the *Mitchell* court observed: There is little incentive for a plaintiff to bring a Title VII suit when the best that she can hope for is an order to her supervisor and to her employer to treat her with the dignity she deserves and the costs of bringing her suit. . . . It is . . . the responsibility of Congress, rather than this Court, to recognize and repair the deficiency in the statute. 629 F. Supp. 636, 643.

[51] *Council* v. *City of Topeka*, 1990 U.S. Dist. Lexis 1315 at 4. (D.Kan. 1990).

[52] *Id.* at 4–5, 7.

[53] *Hall* v. *Gus Construction Co., Inc.*, 842 F.2d 1010, 1012 (8th Cir. 1988).

[54] *Id.* at 1016–17.

[55] National Women's Law Center, *supra* note 27, at 24.

[56] *Foster* v. *Atchison*. Topeka and Santa Fe Ry. Co., 1990 U.S. Dist. Lexis 1338, 1-2 (D. Kan. 1990).

[57] *Id.* at 3–4.

[58] *Id.* at 3.

evidence of pain and suffering, emotional distress or aggravation of health problems which occurred prior to her termination would be barred at trial.[59]

Helen Brooms, an African-American woman, was hired to work as an industrial nurse at the Regal Tube Company. She worked for the company for sixteen months, and endured "numerous explicit racial and sexual remarks" throughout her employment, as well as her supervisor's sexual advances.[60] Her supervisor showed her a pornographic photograph depicting interracial sodomy and suggested that the photograph illustrated her employment requirements. On another occasion he "showed her . ... a racist pornographic picture involving bestiality . . . [and] threatened that the picture depicted how she 'was going to end up.' "[61] When Ms. Brooms tried to take a photocopy of the bestiality picture, her supervisor "grabbed her arm and threatened to kill her if she moved. She threw coffee on him and ran away, screaming and falling down a flight of stairs as she fled." As a result of this abuse, Ms. Brooms was temporarily disabled and severely depressed.[62] Applying *Patterson*, the court dismissed Ms. Brooms' section 1981 claim. However, it affirmed an award of back pay based upon a constructive discharge theory asserted under Title VII.[63] Ms. Brooms received only her lost wages for a two year period, and obtained no compensation for medical expenses and other costs associated with the serious physical and psychological injury caused by her employer's unlawful actions.

Employer Liability for Discriminatory Acts in "Mixed Motive" Cases

Finally Senators, I would like to present testimony regarding Section 4 of the proposed legislation. Section 4 of S. 2104 provides that proof "that race, color, religion, sex, or national origin was a motivating factor for any employment practice" shall constitute a violation of Title VII in cases where "other factors" also influenced the challenged employment practice.[64] Section 4 of the bill also amends the enforcement provisions of Title VII, codified at 42 U.S.C. § 2000e-5(g), to provide that certain Title VII remedies—specifically court-ordered hiring, reinstatement, promotion, union admission or back pay awards to complainants—shall not be available where employers, notwithstanding their violation(s) of Title VII, can establish that they would have "taken the same action in the absence of any discrimination." [65] This section of the bill is intended to ensure that in a "mixed motive" employment discrimination case, that is, one "[w]here a decision was the product of a mixture of legitimate and illegitimate motives," [66] an employer will not be able to excuse its unlawful conduct and avoid all sanctions by demonstrating the co-existence of an ostensibly unbiased motivation for the challenged adverse employment action.

Section 4 of the bill was proposed in response to the U.S. Supreme Court's decision last term in *Price Waterhouse* v. *Hopkins*, 104 L.Ed.2d 268 (1989). In that case Ann Hopkins, a senior manager with Price Waterhouse's Office of Government Services in Washington, D.C., was nominated for partnership by some of the national accounting firm's members.[67] Ms. Hopkins generated more business for the firm during the year of her partnership nomination than any of her fellow nominees. When she was nominated for partnership, only 7 of the firm's 662 partners were women, and Hopkins was the only woman among the 88 partnership candidates that year.[68] After soliciting evaluative comments from the partners, Price Waterhouse decided to hold Hopkins' partnership nomination for future reconsideration. Ultimately, Ms. Hopkins was informed that she would not be reconsidered for partnership, and she resigned from her senior manager position.[69]

Ann Hopkins sued Price Waterhouse, alleging that she was denied partnership on account of her sex, in violation of Title VII. She established at trial that sexism tainted the partners' consideration of her partnership nomination. For example, it was shown that Price Waterhouse partners described Hopkins as "macho" and expressed a belief that she should enroll in "charm school." [70] The partner responsible

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[59] *Id.* at 6–8.
[60] *Brooms* v. *Regal Tube Co.*, 881 F.2d 412, 416 (7th Cir. 1989).
[61] 881 F.2d at 417.
[62] *Id.*
[63] *Id.* at 423–24.
[64] S. 2104 § 4(a).
[65] 5. 2104 § 4(b).
[66] *Price Waterhouse* v. *Hopkins*, 104 L.Ed.2d 268, 285 and n.12 (1989).
[67] *Price Waterhouse* v. *Hopkins*, 104 L.Ed.2d 268, 276–77 (1989).
[68] *Id.* at 277
[69] *Id* .
[70] 104 L.Ed.2d at 278.

for explaining the reasons for the decision to place Hopkins' partnership nomination on hold told Hopkins that she should walk, talk and dress "more femininely, wear make-up, have her hair styled and wear jewelry" in order to improve her chances for employment advancement.[71]

In his plurality opinion, Justice William Brennan wrote:

> some of the partners' comments were the product of stereotyping . . . and . . . the firm in no way disclaimed reliance on those particular comments, either in Hopkins' case or in the past. Certainly a plausible—and, one might say, inevitable—conclusion to draw from this set of circumstances is that the [Price Waterhouse decisionmakers] . . . did in fact take into account all of the partners' comments, including the comments that were motivated by stereotypical notions about women's proper department.[72]

Despite his recognition that "comments that were motivated by stereotypical notions about women's proper department" were among the firm's considerations in its decision to deny partnership to Hopkins, he held that "when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability . . . by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account." [73] The plurality opinion in Price Waterhouse also acknowledged that "the [gender] stereotyping in th[e] case did not simply consist of stray remarks. . . . This [wa]s not .. . . 'discrimination in the air'; rather, it is . . . 'discrimination brought to the ground and visited upon' an employee." [74] Thus, in *Price Waterhouse*, the employer escaped liability despite the abundant evidence of discriminatory conduct.

I believe that the approach adopted by the Court in the *Price Waterhouse* decision seriously undermines the objectives of Title VII. Workplace discrimination cannot be deterred fully if an employer can avoid liability altogether for its discrimination against an employee on account of sex simply because the challenged employment action, though infected by discrimination, is partially supported by lawful motivations as well as by the proven unlawful ones.

Where, as in *Price Waterhouse* an employer's discriminatory acts are "brought to the ground and visited upon an employee," it is essential to impose sanctions against the employer's conduct. The individual complainant's suitability for a position should not be determinative of the question of the employer's liability under those circumstances. The *Price Waterhouse* decision permits even egregious discriminatory employer conduct to remain unchecked by insulating from Title VII liability any decision or action which the employer can demonstrate by a preponderance of the evidence was motivated by a "legitimate reason" as well as an unlawful reason. This is unwise as a matter of public policy, and conflicts with Congress' clear objectives in passing Title VII over twenty-five years ago.

A better approach to "mixed motive" cases—the one in the proposed legislation—would find liability and require appropriate relief to end the proven discrimination.[75] The employer would not have to provide a remedy for the loss of the partnership, however, if it could prove that even absent the proven discrimination, it would not have promoted the plaintiff. This approach furthers Title VII's twin objectives of remediating individual cases of discrimination, as well as "caus[ing] employers . . . to self-examine and to evaluate their employment practices, and to endeavor to eliminate, so far as possible, the last vestiges" of unlawful discrimination.[76]

Before the *Price Waterhouse* decision was announced, some lower courts accounted for employers' defenses that legitimate non-discriminatory reasons motivated their actions, notwithstanding the presence of unlawful motivations, by modifying

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[71] *Id., quoting Hopkins* v. *Price Waterhouse*, 618 F.Supp. 1109, 1117 (D.D.C. 1985) *aff'd* 825 F.2d 458 (D.C. Cir. 1987).

[72] 104 L.Ed.2d at 292.

[73] *Id.* at 293.

[74] *Id.* at 288.

[75] Thus, in the *Price Waterhouse* case, a liability finding could lead to the entry of an injunction against future discriminatory acts by the employer and an order to require the firm's partners to participate in training to identify and eradicate gender stereotyping in the employee evaluation process. Such relief acknowledges the harm done not only to Ann Hopkins, but to all female employees and prospective employees objected to such discrimination in the workplace, while avoiding relief, such as reinstatement, which would be inconsistent with the finding that the employer had sufficient non-discriminatory reasons for denying partnership in Hopkins' case.

[76] *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417–18 (1975).

the remedies available to plaintiffs in mixed motive cases. Thus, for example, if an employer committed a facial violation of Title VII by lying to an employment applicant about the availability of employment and the prospective applicant proved to be unqualified for the position, the courts would sanction the facial violation of Title VII by enjoining future discriminatory acts by the employer and awarding attorney's fees to the plaintiff; they accommodated the employer's legitimate objectives (e.g., the interest in employing a competent and qualified work force) by declining to enter orders requiring hiring or promotion of unqualified plaintiffs. The employer's legitimate interests and objectives are not di8regarded under this view of Title VII—they are deemed relevant to the determination of remedy only, and not considered in the assessment of liability once a plaintiff establishes unlawful discriminatory conduct by the employer. *See e.g. Nanty* v. *Barrows Co.*, 660 F.2d 1327 (9th Cir. 1981) (where employer erroneously informed Apache applicant for employment that an advertised position was filled and subsequently hired two whites to fill the position, court held that award of injunctive relief and attorney's fees is appropriate, even if employer's lawful hiring criteria nevertheless preclude plaintiff from obtaining the position).

In contrast, the *Price Waterhouse* view of Title VII allows even the most blatant employer discrimination on the basis of race, color, sex, national origin or religion to completely escape sanction, so long as the employer can counter the proven discriminatory acts with a demonstration that it would have made the same individual job decision without the taint of discrimination. I believe that by removing the threat of Title VII liability for proven discrimination, this decision liberates employers from the wise constraints of the anti-discrimination law and sets the stage for a resurgence of licentious discrimination in the workplace. The probable results of this approach are suggested by recent judicial decisions.

Hortencia Bohen, an Hispanic municipal government employee awoke from a nap on her first night of work "to find the senior dispatcher's hands pressed against her crotch." [77] She was "a continual target for obscene comments by . . . male employees" and the court described conditions in the Fire department where she worked as "outrageous." [78] Despite the overwhelming proof of a hostile working environment, she received no monetary back pay award under Title VII, because the court found that the harassment "did not result in [her] discharge." [79]

Swanson v. *Elmhurst Chrysler Plymouth, Inc.*,[80] a sexual harassment action filed pursuant to Title VII, yielded similar results. Ms. Swanson demonstrated that her employer subjected her to unwelcome physical contact, sexually suggestive remarks, and other abusive commentary. Despite this proof, she was denied monetary relief under Title VII because her employer persuaded the Court that other factors led to the termination of her employment, and the harassment she endured did not, in the court's view, cause or contribute to her firing.

In both the *Bohen* and *Swanson* cases, deplorable employer conduct has gone unsanctioned, and the goals of identification and correction of discrimination that Title VII was intended to achieve were completely disserved by the rulings that the employer's reasons for the adverse action cancel out plaintiffs' clear demonstration of discriminatory conduct. Similarly, Price Waterhouse threatens to undermine the important objectives of Title VII, not only for individual discrimination victims, but for the entire society.

Title VII was intended to protect the rights of employees as well as to accommodate the legitimate interests of employers. Perhaps most importantly, it was intended to eradicate discrimination on the basis of irrelevant, immutable characteristics in the workplace, recognizing that such discrimination harms the entire nation, and not merely its individual victims.[81] The *Price Waterhouse* decision disregards this most important goal of Title VII by shielding a wide range of employer conduct from Title VII's sanctions entirely.

Although the U.S. Supreme Court plurality stated that "[a]n employer may not . . . prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision," [82] the *Price Waterhouse* approach encourages employers to do precisely that. It is virtually impossible for a discrimination victim to prove that an employer's "legitimate and

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[77] *Bohen*, 799 F.2d at 1182.
[78] *Bohen* v. *City of East Chicago, Ind.*, 799 F.2d 1180, 1183 (7th Cir. 1986).
[79] *Id.* at 1189.
[80] 882 F.2d 1235 (7th Cir. 1989).
[81] *See Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417–18 (1975)
[82] *Id.* at 289.

sufficient reason for its decision" was formulated *after* the discriminatory action was taken or decision was made, and not before.

Furthermore, where subjective hiring criteria are employed, it is frequently difficult, if not impossible, to assess whether the employer's "legitimate" justification for its conduct was itself tainted by discrimination. This difficulty existed in *Price Waterhouse* itself, where the "legitimate" explanation proffered by defendants for the denial of partnership to Ann Hopkins—that she had poor interpersonal skills—is difficult to extricate from the implicit and explicit indications in the record that the Price Waterhouse partners disliked women (but not men) who were, or were perceived to be, aggressive.[83] Similarly, subjective criteria may easily be poisoned by preexisting stereotypes.[84] For example, a white man may be evaluated as "ambitious," where a female employee exhibiting similar traits may be labelled "abrasive," and a similarly situated non-white employee referred to as "uppity." [85]

Because of my concerns that the *Price Waterhouse* decision may unleash a new onslaught of discrimination in the workplace, leave many discrimination victims without redress, and impede the eradication, once and for all, of insidious and irrelevant considerations from decisions about hiring, promoting, and firing employees, I urge the passage of section 4 of this legislation.

CONCLUSION

I fully support the enactment of the proposed Civil Rights Act of 1990, S. 2104. I fervently believe that as a nation, we have improved greatly by beginning to follow the advice of the late Reverend Martin Luther King, Jr., and judging people by the "content of their character" rather than by the color of their skin, their gender, or their religion. By enacting Title VII twenty-five years ago, Congress sought to enshrine this principle in the nation's workplaces, and to ensure that discrimination victims were able to obtain relief for the injuries they sustained as a result of unlawful discrimination. Regrettably, recent decisions of the U.S. Supreme Court have hindered, rather than advanced, the achievement of these objectives.

I urge you, Senators, to assist the nation in its progress towards full equality of employment opportunities by passing the Civil Rights Act of 1990. Not only the victims of discrimination, but the entire nation will be better for the effective deterrence and full remediation of unlawful employment discrimination which the bill promotes. Thank you for your consideration of these remarks.

The CHAIRMAN. Ms. Norton, I am going to have to go to the floor shortly, and I would like to get into perhaps some questions. We will include all the statements in the record.

Ms. NORTON. Well, if you would like to do that.

The CHAIRMAN. If I could inquire of you just for a few questions before I go, I would appreciate your understanding.

Ms. NORTON. Certainly

The CHAIRMAN. The opponents of our bill—you have covered some of these in the testimony but I would like perhaps to sharpen the responses—have asserted that allowing damages in title VII would fundamentally change title VII and interfere with the prompt resolution of claims by the EEOC. You heard that testimony earlier today.

You were chair of the EEOC for 4 years. How do you respond to those assertions?

Ms. NORTON. I was puzzled that Mr. Ayer seemed to feel that by strengthening the relief available under section 1981 we would nec-

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[83] *See generally* Morris, *Stereotypic Alchemy: Transformative Stereotypes and Antidiscrimination Law*, 7 Yale Law & Pol. Rev. 251 (1989) (arguing that "an ostensibly non-suspect characteristic may be transformed, through a process of stereotyping, into a vehicle for discrimination against a suspect class").

[84] *Id.* at 259–62.

[85] *See e.g., Judge* v. *Marsh*, 649 F.Supp. 770, 780 (D.D.C. 1986) (Black female employee's promotion denial held to be attributable to her "abrasive" personality rather than to race or gender discrimination); *cf. Council* v. *City of Topeka* 1990 U.S. Dist. Lexis 1315 (D.Kan. 1990) (Black woman firefighter entering fire department at outset of admission of women labelled "aggressive black bitch" by co-workers).

essarily simultaneously withdraw relief available under title VII. The Congress has always said with respect to these two statutes that it wished to leave both available. The amendments we have submitted, the amendments to which I testified, leave both available, as the congressional intent has always been.

The CHAIRMAN. Well, on the question of the changes in title VII, how much do you see that that would actually interfere with the claims being brought by the EEOC under title VII?

Ms. NORTON. Well, the conciliation provisions, for example, remain available. Most people who sue under title VII sue under both in order to allow themselves to take advantage of whatever advantages each statute offers. That would remain a matter of choice.

People who sue under section 1981 alone, of course, go into court immediately. But I think if you look at most title VII litigation, most title VII litigation is brought under both provisions, which means that almost necessarily the party has to take advantage in one way or another of title VII, including its conciliation provisions or whatever may be applicable.

The CHAIRMAN. Well, would it be fair to say that allowing the damages will not interfere with the prompt resolution of cases by the EEOC under title VII?

Ms. NORTON. I don't see how allowing damages where they are not now allowed would interfere with the prompt resolution of cases. It means that you have more in the mix. But that we urge upon you.

The CHAIRMAN. Well, that is certainly what we intended, and there has been, you know, testimony that by doing that we are somehow going to interfere with the resolution of these cases by the EEOC. And as I understand from what you are saying, after 4 years as chairperson of the EEOC, you don't believe that to be the case, that these are additional kinds of remedies and that, as I understand what you're saying, you believe that increasing these remedies would enhance the possibility for real equity and justice.

Ms. NORTON. That is a possibility for equity and probably enhance the possibility for settlement. I think that employers are going to want to use the process to try to settle the cases to avoid going further into court and having to encounter fees because they know that compensatory damages may, of course, arise there as well.

The CHAIRMAN. Your statement indicates you believe the U.S. Supreme Court's decision in *Price -Waterhouse* seriously undermines the objectives of title VII. But opponents of our response to the decision assert that our bill would punish discriminatory thoughts even where they do not lead to discriminatory action.

Would you explain why that just isn't so?

Ms. NORTON. The notion that title VII ever allowed thoughts as evidence is a surprise to me. If it doesn't allow thoughts as evidence when there is only one motivating factor, I don't see how it could allow thoughts as evidence when there are two.

There must be direct evidence of discrimination. One, at least one of that one piece of that direct evidence may have been the motivating factor. Another piece may have been a contributing factor in order to deter discrimination in that workplace. The employer at

the remedy stage ought to be liable if the court finds that there is liability. For example, there may have been physical distress as a result even though the person wasn't entitled to the job.

The point, I think, here is that this statute is not only remedial, it means to deter, it means to get rid of employment discrimination in the workplace. And if in fact a message we send to employers is that you are not liable even though we have found that discrimination exists in your workplace, then I think we have undermined the basic purpose of the statute to eliminate discrimination in the workplace. We are saying we are only eliminating some discrimination in the workplace.

The CHAIRMAN. So your reading as well as those of the responses is we're not talking about thoughts, we are talking about motivating factors.

Ms. NORTON. There has to be direct evidence of a motivating factor. Thoughts are no more evidence in a mixed-motive case than they are in a single-motive case.

The CHAIRMAN. All right. Could you just tell us, explain how the court's decisions encourages unscrupulous employers to develop after-the-fact rationalizations for discriminatory actions?

Ms. NORTON. *Price Waterhouse* seems to me makes it virtually impossible to show that the employer's motivation was not thought of after the fact. The employer, after all, has the opportunity now to come forward and say it is this and not another factor. And how are we to decide, given the construction of proof in *Price Waterhouse*, when that motivating factor came into the picture.

I think that *Price Waterhouse* makes it very difficult to establish discrimination at all, and it gives the employer yet another bite, yet another chance to show that he did not discriminate and encouraging them to do so.

The CHAIRMAN. So this could really undermine in a serious way some of the progress, important progress that has been made?

Ms. NORTON. I believe so, Senator.

The CHAIRMAN. Mr. Brown, we are glad to have you here. You have had a full day.

Mr. BROWN. Mr. Chairman, I certainly apologize.

The CHAIRMAN. No, it is very understandable. We mentioned in your absence that you were over testifying before a joint committee hearing in the House.

We are delighted to have you here. We mentioned earlier that you chaired the commission during the Nixon administration, and are currently a member of the law firm of Schnader, Harrison, Segal and Lewis, in Philadelphia.

We would be glad to hear from you.

Mr. BROWN. Mr. Chairman, I appreciate the opportunity of appearing before you. I certainly again apologize for the delay in getting over here.

I think, Mr. Chairman, that as I look at my own background, I perhaps have had an advantage of looking at the problems of equal employment opportunity from three different perspectives.

The first was when I was a young practicing attorney in Philadelphia during the 1950's and early 1960's when I primarily represented plaintiffs in civil rights cases and particularly in those cases involving employment discrimination. I shared the kind of frustra-

tion and concerns that most minorities and women faced when attempting to get a job because my own personal background and my own personal experiences clearly indicated that discrimination was rampant, was not limited to the South but indeed was just as blatant in my own home city of Philadelphia.

Having left Philadelphia in 1968, I then at first became a commissioner on an interim appointment under President Johnson at the Equal Employment Opportunity Commission, where I served for some 6 months, then was named to a position and confirmed by the Senate under President Nixon, as you have indicated, and named chairman and remained chairman from about May of 1969 until December of 1973.

When I left the Government, I came to the law firm that I am presently a partner with, and in that capacity since 1974 have primarily represented major corporations in defending them against charges of discrimination. But I think of perhaps equal and even greater importance, I serve as a consultant in assisting them in making certain that their policies and programs bring and keep them in conformity with title VII and all the civil rights acts.

So that I think that I do have that broad perspective.

I can remember, Mr. Chairman, in the early days of the commission when we were completely without enforcement powers, the kind of hopelessness and frustration that all of us at the commission felt. And in spite of that, we did accomplish, I think, some significant achievements in spite of the lack of enforcement, one of which, I think as I look back on it, was looking at the commission when the *Griggs* case was up for discussion.

We had taken the position at the commission that those types of selection devices, even though they were fair on their face but had a disparate impact, was a violation of title VII. And having taken that position, I can remember now as clearly as if it was yesterday the kind of elation and almost euphoria which swept the commission when we were advised of the decision of the U.S. Supreme Court, a decision 8–0, and a decision given by Chief Justice Burger.

I think unfortunately at that time many of us felt that the problems of discrimination would be greatly lessened, that the impact of *Griggs* would change the profile of many employers across this country both in terms of their minority/nonminority setup as well as the male/female relationship. Unfortunately, that was not to be.

I look back at that time and remember the kind of cry that went up from many employers who felt that they could not meet the *Griggs* decision. In spite of that, the experience which I have had indicates that not only were they able to meet the *Griggs* standard, but they have continued to operate under that for some 18 years.

If there is anything that causes most corporations the kind of concern that is generally expressed, it is the lack of stability, the lack of definiteness, the lack of knowing exactly what standard they are going to be held accountable for.

The *Wards Cove* decision, I believe, has now once again thrown this whole area into complete turmoil. And I think it is critical because I believe that the civil rights legislation of 1964, and particularly title VII of that act, was perhaps one of the most important pieces of legislation certainly in this century.

I am absolutely convinced that the employers across this country have been able to meet those standards. There is no question, when we look back at some of what we view now as being almost asinine kind of requirements for jobs, the use of application forms which asked all sorts of needless questions, the use of a high school diploma for jobs which clearly did not require that.

There is no question that those things have been changed dramatically. And from my own experience, most employers felt and continue to feel that the changes brought about because of title VII and because of the *Griggs* decision and other decisions which came along behind it, have not only improved the working relationship and the opportunities for minorities and women, but of even greater importance, has improved indeed the entire workforce and the way that all employees are being treated. And I think that is a decided benefit.

As I look, Mr. Chairman, and having read, as I am sure that you and the other members of this committee, the study done by the Hudson Institute, the Workforce 2000 study, which clearly indicates that by the turn of the century the overwhelming majority of people entering the workforce for the first time will be minorities, immigrants, and women, and that that workforce will continue to shrink at a time when even greater numbers are going to be required, even greater numbers of people with higher skills because we are entering into a more technical world than what we have been used to in the past, it will be those employers who make equal employment a major part of their organization and not just give pure lip service to us who will be able to compete for this dwindling supply of needed employees.

I am prepared to speak not only as to the *Wards Cove* decision and the impact of *Griggs*, but I am also willing to discuss, to the extent that I may be prepared to do so, those issues that are contained in your bill at the pleasure of the committee.

I have deliberately tried to keep my remarks as brief as possible, realizing, of course, the tremendous limitation on time that you have. And I am at this point willing to answer any questions that the members of the committee might have.

[The prepared statement of Mr. Brown follows:]

PREPARED STATEMENT OF WILLIAM H. BROWN III

Mr. Chairman and Members of the Committee: My name is William H. Brown III and I have been active in the field of civil rights for nearly 35 years with a significant portion of that time being spent in employment discrimination and related matters. During the late 50's and early 60's, I represented many individuals, who felt that their civil rights had been violated. The majority of these individuals were represented on a pro bono basis.

Given an interim appointment by President Lyndon B. Johnson, I served as a member of the Equal Employment Opportunity Commission from October of 1968 until May of 1969. President Richard M. Nixon submitted my name to the Senate for confirmation and after being confirmed, I was designated Chairman of the Commission, serving in that capacity from May of 1969 until December of 1973.

Since early 1874, I have been a law partner in the Philadelphia based law firm of Schnader, Harrison, Segal & Lewis representing primarily major corporations in employment discrimination and related matters. I represent these clients not only in litigation around the country but of even greater importance, I serve as a consultant to these corporations, advising them as to how best to comply with the equal employment laws in a way which will allow them to carry out their corporate obligations in the most responsible manner.

I am a member of the Citizens' Commission on Civil Rights, a bipartisan group of former officials who have served in the Federal Government in positions with responsibility for equal opportunity. This commission was established in 1982, under the chairmanship of Arthur Fleming, to monitor the policies and practices of the Federal Government and to seek ways to accelerate progress in civil rights.

I also serve as a member of the Board of Directors and of the Executive Committee of the Lawyers' Committee for Civil Rights Under Law, as well as a member of the Board of Directors of the NAACP Legal Defense and Education Fund.

Today, I only speak for Bill Brown. Since I have had a very limited opportunity to discuss my views with the civil rights organizations of which I am a part and I have had no opportunity to discuss my views with any of the clients that I have the privilege of representing. By expressing only my own views will allow all interested parties to accept or reject any or all of my testimony here today.

My background and training has afforded me the unique opportunity to view the problems of employment discrimination from three distinct vantage points. During the 1950's and for a substantial portion of the 1960's, I represented plaintiffs in civil rights actions including employment discrimination cases as a young practicing attorney in Philadelphia. The frustrations and anger felt by many of my clients at their inability to secure meaningful employment because of the color of their skin mirrored much of my own personal frustration I felt when being rejected for a job for which I was qualified merely because of my race.

A different opportunity I have had to view the problems of employment discrimination was occasioned by my appointment first as a member of the United States Equal Employment Opportunity Commission and then serving as its Chairman for nearly five years. The passage of the Civil Rights Act of 1964 and in particular Title VII of that legislation was viewed by many minorities and women as their ticket to employment opportunities heretofore denied them. I believe that during this century, no single piece of legislation has had a more profound effect upon our country than the Civil Rights Act of 1964. The most dramatic changes in our way of life, and particularly in the corporate way of life, have been brought about by Title VII. EEOC was charged with the responsibility of eliminating discrimination in employment if such discrimination was based on race, religion, sex or national origin.

My third vantage point, one which I have held since 1974 is related to my representation of major corporations in defending them against charges of discrimination and, more importantly, serving as a consultant to aid them in complying with the law.

I am pleased to appear before you this afternoon to comment on Senate Bill 2104, cited as the "Civil Rights Act of 1990." While I will be pleased to answer any questions the Committee members might have concerning the entire bill, I prefer in my brief remarks to deal specifically with those sections of the Bill designed to remedy the effects of the U.S. Supreme Court's decision in the *Wards Cove Packing Company* v. *Antonio* case,[1] decided in June of last year. The effect of the *Wards Cove* decision is to so severely limit the effects of the *Griggs* v. *Duke Power* decision to make it almost a complete nullity.

In what has been viewed by many as one of the most important Supreme Court decisions this century, a unanimous court speaking through Mr. Chief Justice Burger held that employment practices which operate to exclude minorities (Blacks in this case) and which cannot be shown to be related to job performance, are prohibited. In both scope and depth, *Griggs* v. *Duke Power* has the same ring as did *Brown* v. *Board of Education* in 1954. For eighteen years since *Griggs*, nearly all of our Federal Courts, both trial and appellate, have recognized that acts or practices which might be fair in form but are discriminatory in their operation are in violation of Title VII.

While there was an initial uproar from the business community, in a very short period of time most employers came to realize and accept that their employment practices must have a demonstrated job relevance whenever they operated as barriers to the hiring and promotion of minorities and women. The message which *Griggs* sent was clear. No longer could personnel departments or businesses follow the "business as usual" policy. At the time that *Griggs* was decided, a large majority of employers had never demonstrated the business necessity of their employment practices.

Furthermore, most of those practices as then presently constituted in our society did have an adverse impact on the job opportunities for minorities and women. This combination of adversity and irrelevance of hiring standards to work performance is

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[1] 109 S.Ct. 2115 (1989), 104 L. Ed. 2d 733.

precisely what the U.S. Supreme Court found unlawful under Title VII in deciding *Griggs*.

During my early tenure as Chairman of EEOC, the lack of enforcement powers for the Commission and the need to rely upon the limited staff of the Justice Department and those victims of discrimination, along with civil rights agencies and other interested individuals to institute lawsuits was our only hope of salvation. The Commission all along had taken the position that the use of general intelligence tests, high school diplomas, height and weight requirements which could not be shown to be directly related to the position to be filled was a violation of Title VII. I can still clearly recall the elation which swept through the Commission when the *Griggs* decision was announced. Some of the language of the *Griggs* decision is so moving that it requires specific mention here. The Court stated that what was required by Congress was the removal of artificial, arbitrary, and unnecessary barriers to employment when those barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications.

At least the Burger Court felt that the objective of Congress in the enactment of Title VII was plain from the language of the statute. They stated that "it was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." [2] The Court went on to say "the Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to excludes Negroes cannot be shown to be related to job performance, the practice is prohibited."

Intent under the *Griggs* test was to play no part in determining whether there was discrimination. The Court held:

> "We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or absence of discriminatory intent does not rem=deem employment procedures or testing mechanisms that operate as 'built-in head winds' for minority groups and are unrelated to measuring job capability."

It went on to say that the ". . . Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." (Emphasis that of the Court.) Clearly under the *Griggs* decision, the burden of showing business necessity was placed squarely on the shoulders of the employer who advanced such a defense. Many employers argued that the burden would be onerous and that it would cost too much to validate all employment practices that have an adverse effect on classes of individuals protected by Title VII. During the substantial period of time that has elapsed since the *Griggs* decision, most employers covered under Title VII have come to accept the burden placed upon them by the *Griggs* court.

The significant advancements of minorities and women into jobs historically held by white males in a large measure is a direct result of the impact of the *Griggs* decision. During the past 18 years, the requirements imposed by the Federal courts interpreting *Griggs* have dramatically changed the number of Blacks and women now in positions from which they have been traditionally barred. In addition, adherence to the equal employment opportunity laws has had a positive affect on most employers. Major corporations have had to rethink their personnel policies, not just in terms of how they affect Blacks, other minorities and women. In doing so, many found that they have improved the working environment of all employees.[3] A large percentage of employers have found that there had been improvements in their procedures and standards for hiring and in the use of discipline and employee performance reviews. Many employers have indicated that as they have been required to respond to affirmative action, their companies have been better able to identify *relevant* qualifications for various jobs and their ability to recruit and well-qualified candidates has improved significantly.

While Title VII has been neither a panacea nor a substitute for economic growth, education, job training and ambition, Title VII has made significant contributions to the ongoing effort to eliminate the inequality caused by a history of discrimination.

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[2] 401 U.S. at 429, 439.

[3] *See*, Citizens' Commission on Civil Rights study, Affirmative Actions Open the Doors of Job Opportunity—A Policy of Fairness and Compassion That Has Worked (June 1984).

Who can deny that the police and fire departments of the major cities of this country now that they have increased the number of minorities and women are much more sensitive organizations and are, indeed, more responsive to the legitimate concerns of the minority community? The changes in the racial profile and sexual profile of our workforce are dramatic. Can it be denied that in the past 25 years, significant changes have been made in the very fabric of our major corporations? Things that we now accept without question would have been unheard of throughout the country in the late 50's and early 60's.

It appears clear to me that if the *Wards Cove* decision stands uncorrected millions of American citizens will be left unprotected. More importantly the impact of the *Wards Cove* decision has created such a state of confusion among major employers who have come to accept, endorse and, indeed, benefit from the impact of the *Griggs* decision.

The greatest concern of most employers and corporations that I represent is the lack of clear direction or, more importantly, the lack of stability.

Until the *Wards Cove* decision last year, most employers accepted the burden of establishing a business justification defense when their employment practices, tests and other devices disproportionately excluded minorities and women from their jobs. Many corporations have already expended huge sums of money, examining and verifying the validity of their employment practices and how these practices might impact adversely on minorities and women. The Burger Court in *Griggs* clearly felt that both the burden and cost of establishing a business justification defense was one more appropriately borne by the employer.

I sincerely believe that the overwhelming majority of employers in this country are not unmindful of the dynamic changes in the workforce composition predicted in the Hudson Institute's Workforce 2000 study. Major employers will be in direct competition with each other as the availability of qualified employees shrinks while at the same time the composition of the workforce becomes increasingly minority and female. Those employers who have established themselves as equal opportunity employers will have a decided advantage in attracting and retaining the workers who will be available to them at the turn of the century.

While I have confined my written remarks to the *Wards Cove* decision and its implications, I shall be happy to respond to any questions that the Committee might have regarding other aspects of the Bill.

Finally, Mr. Chairman, because my schedule has not permitted me to give the kind of careful attention to all aspects of this Bill that I would have preferred, I request an opportunity, if I deem it necessary to further augment my written comments at a later point in time.

Mr. Chairman, I am appreciative of the opportunity to express my views on this subject. I am happy to answer any question that you or any member of the subcommittee may have.

Senator JEFFORDS. [presiding] Thank you very much, Mr. Brown. We are delighted to have you with us. I would like to give you an opportunity to comment on the assertions made by Mr. Ayer regarding our bill's response to the *Wards Cove* decision.

How do you respond to the assertion that the bill would make any racial disparity a prima facie case of employment discrimination?

Mr. BROWN. Well, I just think that is just totally misguided, Senator. I don't think that a fact at all. When we look at the impact of the *Griggs* decision and what that has done, that certainly has not made the filing of charges by persons who feel they have been discriminated an easy task at all. The burden still remains with the plaintiff to establish that they in fact have been discriminated against.

And I think that *Wards Cove* really has set us back. It has set us back in terms of what the burdens should be. It has shifted the burden from the employer who in the past has had the obligation to justify the selection devices to the extent that they want to use a defense of business necessity.

I believe that that burden is properly placed upon the employers of this country. It is a burden which they have assumed since the *Griggs* decision. It is one which I have had very little comment saying that it has been onerous. And to place that burden now on the individual plaintiffs to show that some portion of the business of the employer cannot be justified as a business necessity really ties the hands of the individual plaintiffs. We are very, very limited, and I guess I have the advantage of being on the defense side now. From a defense standpoint, I think it makes our job much easier, there is no question about that.

But I think that the thing which we are concerned about, or should be concerned about, is the fairness of the process. And I disagree substantially with the position taken concerning the effect of *Wards Cove.*

Senator JEFFORDS. I presume that also means that you would believe that the standard of proof is not so high that it requires quotas?

Mr. BROWN. Absolutely. There is nothing in the bill, as I view it, and absolutely nothing in the *Griggs* decision and the implementation of the *Griggs* decision, which in my mind at least has ever indicated a need for quotas. And I don't think that has been changed by the bill which is before us today.

Senator JEFFORDS. How realistic is the U.S. Supreme Court's assertion that since you have discovery procedures now that really the plaintiff is able to ascertain as to what the motives of the employer were?

Mr. BROWN. Well, my guess, as a practicing lawyer, you always are careful about being very critical openly of the U.S. Supreme Court. But I would hasten to say that the discovery process is designed under our Federal rules to ferret out certain kinds of information. When you talk about the reasons why an employer made certain decisions, some of those reasons are so obscure that no amount of discovery is going to be able to discover that.

I remember hearing from one of our former mayors and one of our former chiefs of police in Philadelphia—who shall go nameless, but I am sure most people know who he is—when he was talking about the problems of written tests to be used in screening people for the police department. And the city had taken the position that these tests were discriminatory.

His position was, "You know, we shouldn't worry about the written tests. No one pays any attention to the written tests because it's not the written test, it's the oral examination which is the important thing."

And he was absolutely right. I don't think he was right in the sense that he realized he was right, but it was clear that what he was saying is that no matter what the written test might have been, you can look at the numbers, but when you want to or if you desire to give someone a boost, you would have an oral examination and you just rate them high. If you wanted to downgrade someone's score, you would have your examination and you would just lower that score low enough so they could not come out high on the overall test.

The discovery process is not going to ferret out the kinds of things that you are talking about in those kinds of cases. There are just going to be too many areas.

The subjectivity of decisions as to why a particular person is better qualified, when you talk about things of leadership quality and when you talk about the things of commitment to the company, all these various areas which are in the minds of many employers, and in many cases properly so, critical elements to be considered. But there is no amount of discovery which is really going to allow a plaintiff without extensive amount of expenditure of funds to even begin to be able to develop the kind of testimony and information which is going to satisfy the legal tests.

And I think for that reason it is much more appropriate that if the employer decides that he wants to raise or she wants to raise the business defense or business necessity defense, that that is appropriately a burden placed on the person raising that defense.

Senator JEFFORDS. I would be interested as to what requirements there are in the law now for an employer that is covered to maintain records of such interviews. Is there any requirement at all on an oral interview to note as to why a person scored high or low? And what about applications and things like that? So what do you find when you ask for discovery that is relevant in these areas?

Mr. BROWN. Well, you generally will find applications because most employers now do in fact maintain applications for a significant period of time. You will find on the question of oral interviews, it will go all over the lot. In many cases you will have absolutely no recording of the questions that were asked, the kinds of answers that were given or anything else. In some cases you will have very limited notations which I think will be of very little use to you.

In other areas of the actual written evaluations, you will find that, for the most part, employers do maintain written evaluations. The tragic part about that sometimes is these evaluations, even though many times they are to be done on a periodic basis, either annually or semiannually or whatever, many times you will find they are not conducted. And that has nothing to do with discrimination, you will find that that is true across the board.

You will find that there is going to be a wide variance in terms of other kinds of reports and records which are maintained. Every once in a while you will get lucky and you will see almost a smoking gun.

I remember a case last year an age discrimination case, and the question was whether or not they were trying to screen out the older individuals. And there were notations on some of those records: "This is a young Turk." "This one appears to be over the hill."

The truth of the matter, Senator, is that those kinds of records are found very, very seldom, and because there is no uniform requirement which would encompass all of the various kinds of mechanisms for making a judgment, it is dependent upon the employer generally themselves to determine which records are to be kept, except for those specifically required to be kept by law.

Senator JEFFORDS. My final question: The assertion is made that we do more than restore *Griggs* in the bill. And I wondered if you would comment as to your feelings with respect to that.

Mr. BROWN. I think that the bill, as I have read it, really takes us back to where the *Griggs* decision was made back in 1971. I don't see that this bill does anything more than that. I think it is a matter of just restoring *Griggs* and the *Griggs* decision and the effects of the *Griggs* decision.

At the time that the decision was handed down, I think that even the Court itself clearly felt that many of the types of selection devices which had been used extensively by many companies had a disparate impact, clearly had a disparate impact in many cases on minorities and in many other cases on women. And the Court felt that to the extent those selection devices could not be validated—and you can recall and I can recall the general use of general intelligence, and I use that word advisedly, tests which were given as a means of judging whether or not a particular individual was going to make a good employee.

In many cases, the requirements were far greater than what was needed for the particular job which was being filled, and we had the, I guess, old idea of the janitor having the ability in theory at least to some day progress to being president of the company and therefore the standards for the position of a janitor should be much, much higher because of that ability.

Griggs would say that to the extent that that was not an appropriate business judgment and it could not be shown to be directly related to the job of the manager and if it in fact had a disparate impact on one of the protected groups, then that would be illegal. And I think that this legislation pretty much mirrors *Griggs*. I don't see any significant changes in the *Griggs* decision and the subsequent interpretations of *Griggs*.

Senator JEFFORDS. Thank you.

Ms. Norton, I apologize for not having been here earlier. We negotiated the Clean Air Bill until 4 a.m. last night, and we went back in at 11 a.m. on Clean Air this morning. But I do have a couple of questions for you.

I wanted to turn to *Martin* v. *Wilks* just for a moment. Doesn't the statute of limitations eventually cut off the party's right to a day in court?

Ms. NORTON. Normally every action normally in the law, except perhaps murder, we expect to have a statute of limitations.

Senator JEFFORDS. And aren't the touchstones of due process notice and an opportunity to be heard?

Ms. NORTON. Those are the traditional touchstones of due process. Above all, we want to make litigation final and not give people several bites of the same apple.

Senator JEFFORDS. And are disparate impact classes likely to be class actions?

Ms. NORTON. Disparate impact matters are usually class action.

Senator JEFFORDS. And hasn't the court set due process standards for notice in class actions?

Ms. NORTON. It certainly has. There is much litigation on notice in class action, much of it confining litigation from the U.S. Supreme Court and the Federal Courts.

Senator JEFFORDS. And do you feel that there is any reason to believe district Courts are incapable of applying those notice standards in civil rights cases?

Ms. NORTON. On the contrary, I think the district Courts, taking into account the facts before them, are in the best position to guarantee that there is adequate notice. And I must say I think only they are in a good position to do that.

Senator JEFFORDS. Thank you.

Thank you, Mr. Chairman. I am sorry I have to leave again.

Thank you, and this was very excellent testimony. We deeply appreciate it.

Senator METZENBAUM [presiding.] It is obviously a sort of a rotating, revolving group up here. [Laughter.]

We come and go.

Mr. BROWN. The rotation is here as well, Mr. Chairman.

Senator METZENBAUM. I am happy to see both of you, and certainly both of you have great records in this area.

Ms. Norton, section 8 of the bill allows victims of intentional discrimination under title VII to seek compensatory and punitive damages. Opponents of that provision contend that section 8 will eliminate the conciliation and settlement role of the EEOC.

As former chair of the EEOC, what effect do you think section 8 will have on the EEOC's role in the process?

Ms. NORTON. I am puzzled by the notion that this legislation, this proposed legislation, S. 2104 by its very existence alters longstanding requirements of title VII.

It seems to me that the commission, which has had much experience in conciliation, will be able to use whatever Congress says is applicable under the law in conciliation. I am not sure I understand why Mr. Ayer or others believe there is a conflict here. I am puzzled by it.

Senator METZENBAUM. I am sure that I can answer it.

Should we look the other way when an employer relies on racism and other prejudices in making an employment decision when the employer also relies on an independent, lawful reason for the decision—in other words, he has a lawful reason but also has a discriminatory reason and relies upon the former to justify the latter?

Ms. NORTON. Senator Metzenbaum, in the hypothetical you pose, what we have is a situation where the plaintiff has established carrying the burden of discrimination, established discrimination in as perhaps a motivating factor or not, but it is established discrimination.

Now the question becomes which discrimination that has been established was responsible for the employer's decision. Or at least that is the question in *Price Waterhouse*.

The concern we have is that if the employer is not made responsible for all of the discrimination that has been proved against him, he has no incentive to rid his workplace of that discrimination.

Beyond that, other employers are not deterred from engaging in the same discrimination, knowing that they cannot be held liable.

And finally, the plaintiff on whom that discrimination may have had a measurable effect can, in appropriate circumstances, not even get an injunction or, as the case may be, compensatory damages if, for example, despite not being eligible for the particular job

the employer's discrimination now proved resulted in actual damage to himself, perhaps medical damage or some sort of humiliation. I don't know why we would want to excuse the employer from taking responsibility for that.

Now, what we don't want, of course, is to impose on the employer the obligation to offer that person the position for which that person is apparently not qualified. At the same time, we want to hold the employer responsible for the discrimination that has been proved against him. The appropriate way to do that, in our judgment, is at the remedy stage to have the court look and see whether in light of what has been proved there is any discrimination to be remedied or whether an injunction should lie or, in its general remedial powers, what should be done under the circumstances.

Now, the fact is it is probably the case that in many cases a remedy of some kind would not obtain. But a remedy might indeed be very necessary in such cases. And normally the Congress has not limited the power of Federal judges to see that remedies appropriate to what has been proved in fact obtain. And I don't see why we would want to do any different for title VII cases.

Senator METZENBAUM. Thank you.

Mr. Brown, before I ask you a question or two, is Mr. Bernard Siegal of your firm still alive?

Mr. BROWN. Yes, he is, and very, very active at about 84 years of age. And he is a most amazing person, as you well know. He was one of the original founders of the Lawyers Committee for Civil Rights and, I think, was one of the first cochairs of that committee.

I remember not too long ago when I was working with him and it was about 2 o'clock in the morning and I had told him that I was getting a little tired. And he was quick to say that they don't make the young people like they used to. [Laughter.]

I certainly will give him your regards. He speaks very highly of you.

Senator METZENBAUM. He provides distinguished leadership in the country, and I would send him my regards. That is off the record. No, leave it on the record. [Laughter.]

The administration has indicated that the *Wards Cove* decision is consistent with past precedent under title VII. Do you agree with that analysis?

Mr. BROWN. No, I don't. I don't think it is consistent. It is certainly not consistent with the burden of proof for certain aspects of those cases. The burden of proof to prove a business necessity, under *Griggs*, certainly was applied to the employer who would assert such a defense.

There is no question in my mind that the *Wards Cove* decision has taken us back 18 years, and I think the important thing that we should recall is that we have operated under *Griggs* and the decision of *Griggs* for these 18 years and I have not heard the kind of hue and cry even out of the business community that *Griggs* continues to impose any undue burden on them. Most of the employers are in the position of justifying or attempting to justify whatever actions that they take. I see no reason why we should undo what has happened in the past and which is proven.

I think, as I look back on *Griggs*, and I can remember, Senator, being at the Equal Employment Opportunity Commission as its

chairman when *Griggs* came down, we did not have enforcement powers at that time, and I can remember the almost ecstatic state of the entire commission force as we learned of that decision. I think that type of happiness, if you will, was shared by many civil rights organizations and other organizations committed to making certain that this country lives up to its obligations particularly as it applies to equal employment opportunity.

I see no reason for us to backtrack, and there is no doubt in my mind that the *Wards Cove* decision indeed takes us back along a route and I think it moves us back 18 years in time, for no apparent reason.

Senator METZENBAUM. Just one last question: The firm that you are with represents corporations. Isn't that correct?

Mr. BROWN. That's correct.

Senator METZENBAUM. And how many members in your firm?

Mr. BROWN. We are approximately 250 members now.

Senator METZENBAUM. So you would be in touch with employers who have lived under *Griggs*. In your years of experience, do you know of any employers that have been forced to adopt mandatory quotas by reason of *Griggs*?

Mr. BROWN. Absolutely none. In fact, I have in my responsibilities at the firm, I guess I am one of the senior partners in the firm, both in the labor department and the litigation department, and almost 90 percent of my practice is devoted to the area of equal employment opportunity and related kinds of cases, sexual harassment, age discrimination cases and things of the like.

There has never been any question in my mind that the employers that we represent—and perhaps we are just lucky to represent more enlightened employers; I tend to think that we are really reflective of the representation of employers generally—I know of no employer who has been forced to adopt a quota because of the *Griggs* decision. And I think they have come to accept the fact that their workforce should indeed be reflective of the availability of qualified individuals no matter what their color.

I have never heard any of the employers whom I have come in contact with, either as clients or in the many talks and discussions that I have had around the country with employer organizations and groups, ever suggest to me that *Griggs* did in fact require them to impose a quota system.

Senator METZENBAUM. Thank you very much.

Senator SIMON. Yes.

First of all, Ms. Norton, I quoted you in another committee, the Judiciary Committee, in which we also serve, and you used a great line that I wish I could remember. It has nothing to do with the bill pending, but talking about the war on drugs, you said, "We are great at taking prisoners, but not very good on healing the wounded." Those are not the exact words, but it was a great line.

Senator METZENBAUM. Ms. Norton has designated me to tell you that you are at liberty to use it whenever you want and you need not give her credit. [Laughter.]

Ms. NORTON. Indeed, I believe I sent a copy of the NPR commentary to Senator Simon. I appreciate your kind comments, Senator.

Senator SIMON. You in your testimony—and I regret I have been tied up, as Senator Metzenbaum knows, in discussions on Clean

Air. So I have not been here for this whole hearing, but I am very much interested—but you mentioned this case of Terrell McGinnis. Maybe you mentioned it in your oral testimony too. It is just flagrant.

My concern, however, goes to one other thing that is part of the present proposal. That is this restaurant in which he works. If that restaurant employs 13 people, title VII does not cover it. By excluding those employing 15 or fewer in title VII, we exclude 11 million workers in this country.

Now, I understand the practical politics here that we want to get a bill passed and we don't want to get a bill so good that it can't pass.

But do either you, Ms. Norton, or Mr. Brown, have any comments on this delineation that we have made of 15 employees or fewer?

Ms. NORTON. Well, I think that is one of the reasons we want to make sure these two statutes are in conformity with one another so that the disadvantages, one, can be made up for by the disadvantages of the other.

Now, the McGinnis case that you raise, it was a racial harassment case. If it had been a racial employment case to cause it, there would have been no remedy for his employment discrimination even as there is now no remedy for his racial harassment.

That is the reason why counsel normally join the two statutes. What *Patterson* does, of course, is to put racial harassment out of the reach under section 1981 altogether and therefore the advantages of section 1981, whatever they may be, and they are numerous, may be necessary in a particular case but are simply not available. It's very important that we look at the antidiscrimination laws as a coherent body of law and that particularly we don't prefer one group over another so that one group may get a remedy that another group may not and that we try to make up for the deficiencies of one of the statutes by making sure that the advantages of the other are there.

That is the way in which we have looked at this legislation to correct not only the clear problems raised by the U.S. Supreme Court decisions of 1987 and 1988 but also to use this opportunity to correct glaring defects in the statute that have resulted in particular hardship to some of those covered.

Mr. BROWN. Senator Simon, I think that Eleanor is quite correct. The current statute under title VII would not change that, as I understand it. And I think, just to expand on what Eleanor has said, one of the differences is the differences of who is protected under the various pieces of legislation.

For example, under section 1981, minorities would be protected and they would have the right to not only receive back-pay awards but compensatory damages and indeed, in those cases where it is appropriate, punitive damages.

Under title VII, since section 1981 does not apply to sex, it eliminates that kind of relief for women, many of whom have been treated just as harshly, and in the areas of sexual harassment, even more harshly than certainly males and even many minorities.

Under title VII, then of course the bill could, as it is presently being proposed, address that inequity of saying that we have the

ability to protect minorities under section 1981 for intentional infliction of discrimination, to allow them compensatory damages, to allow them punitive damages, and even under the, I guess it is, the *Santa Fe* case—and I would have to admit my surprise when the U.S. Supreme Court decided it—but the U.S. Supreme Court even held that white males indeed were protected under the provisions of section 1981, which seems to me to say that only women and in this case primarily white women, would not be protected because they would not be included under the terms of section 1981.

And to the extent we have those kind of inequities, I think it is appropriate that we try to eliminate them to the extent that that is possible.

Senator SIMON. If I may ask one further question here that, again, is not part of the pending bill but is very much related to it. I have introduced, and Senator Metzenbaum and others have cosponsored, a bill that would reverse the *Richmond* case. This bill is before the Governmental Affairs Committee rather than this committee.

Any comments that either of you have on the need for reversing the *Richmond* case?

Ms. NORTON. I haven't seen the legislation, Senator Simon, but I am very pleased to hear that you have introduced a bill.

I must say, as someone who has been asked by various States and localities for advice on the *Croson* results and what should be done, that this is an area that is now in rank confusion, where States and localities are spending money on procedures that they think may be compelled by the U.S. Supreme Court but which they have little faith in.

The States and cities have been put in the position of having to reconstruct, as it were, a history of discrimination in contracting over more than 100 years. The burden is quite intolerable. The concern is very great.

This is, after all, money, State money that is being used when contracts are being let. An entrepreneurial class of blacks in particular, later of Hispanics and women, began to develop after the set-aside notion began to take hold in the States and cities. Now it has been virtually yanked away by a U.S. Supreme Court decision that makes it very doubtful that many States and localities can comply if we are to understand even what compliance is.

So I very much welcome Federal authority that will clarify what the standards are when States and localities seek to let contracts in such a way as to make up for past discrimination against minorities and women.

Senator SIMON. If I could just add my observation, it is that some States and localities that were not very eager to do anything in the first place now have an excuse for not doing anything.

Mr. Brown, any comments?

Mr. BROWN. Yes, that's quite true, Senator. As a matter of fact, in Philadelphia we have quite a dilemma trying to decide just exactly what the impact of the *Croson* decision is going to be. And even in those areas where there has been a specific finding of discrimination against minorities and women in the past in the allowing and letting of various contracts, in one of our situations it was held that even those persons were not entitled to be considered.

I must admit that I share Eleanor's concern, and I must admit that I am really just not familiar enough with the proposed bill to be more helpful to the committee in trying to give some answers to obviously very, very difficult questions.

Senator SIMON. I thank you both.

Thank you, Mr. Chairman.

Senator METZENBAUM. Thank you.

I thank both of you very much not only for your testimony today but for your long record of service in this area. We appreciate it and look forward to continuing to work with you.

Mr. BROWN. Thank you very much.

Ms. NORTON. Thank you, Senators.

Senator METZENBAUM. Our next witness is Ms. Patricia Swanson of Ingleside, IL. I must say that we are most grateful to Ms. Swanson who traveled here today to share with us some very painful experiences she had. The chair is very interested in hearing her statement, but wants her to know that the chair has some constraints of time and if I have to leave it is not from a lack of interest, it is from a lack of time. Senator Simon will continue to preside afterward.

But, Ms. Swanson, please proceed.

STATEMENT OF PATRICIA G. SWANSON, INGLESIDE, IL

Ms. SWANSON. My name is Patricia Swanson. I am from Ingleside, IL, and I would like to thank you for inviting me to testify today.

Senator METZENBAUM. Could you pull the mike a little closer, please? Thank you.

Ms. SWANSON. I worked for over a year as an assistant finance manager for Elmhurst Chrysler-Plymouth, and throughout that time I was sexually harassed by my boss, Roger Meacham.

I took him to court for it, and I proved that he had harassed me. In spite of that I got nothing from the court—and now I even have to pay Roger Meacham's court costs.

I am here today to tell you about what happened. I started work at Elmhurst Chrysler-Plymouth on November 6, 1983. My husband had just opened a used-car business and we needed my salary to live on. Shortly after that the harassment started.

Roger Meacham, my boss and part-owner of the dealership, would sneak up behind me and try to unhook my bra. This happened at least two or three times a week. I sometimes had to scoot down in my chair to keep him from succeeding, and even then he would reach down the chair and keep trying.

Roger said he couldn't wait for the Christmas party because it was a ritual for him to go around and feel all the women's breasts. He said as boss he was allowed to do that.

I told him I would not allow it to be done to me. From that day until the Christmas party, Roger made several comments about his ritual. I stayed in my office most of the day of the party, as I did not want to participate in his ritual.

At another gathering in the main office, when salesmen, office girls, and mechanics were all present, Roger started talking about his vasectomy. He said his doctor told him he had to have sex ten

nes before he was safe. He turned to me and said, "I have two to go. Would you like to help clean out my tubes?"

I went back to my office close to tears. I thought about just walking out that time, but I needed the money. I was the sole support of my family at that time.

On several occasions Roger would run up behind me in the hallway and run his hand under my skirt and grab me between my legs and my thigh. One time I was carrying a cup of hot coffee when he did this, and I spilled it down the front of me. He told me to take my clothes off right there and he would have them cleaned.

I went to the ladies room to clean up in private, and he followed me in. As I was wiping the coffee off my blouse, he tried to take the paper towel out of my hands and wipe off my chest himself. He didn't leave until I started to cry.

One very hot day in 1984 he said in front of two of the girls from the office and one of the salesmen that if he had his way, all the females would work topless. He then turned to me and said that I would be the first and he would personally remove my blouse.

One of the girls said, "If the girls have to go topless, then shouldn't the men have to remove their pants?" Roger said, "That's okay with me," and ran over next to me at my desk and dropped his pants to the floor. I got upset and put my head in my hands and said, "Please put your pants on and get out of the office." I told him that I had a customer coming in and I didn't appreciate his actions.

I looked out the door and saw the salesman coming down the hall with the customer. When Roger saw them, he pulled his pants up and was just buckling them when the customer walked into my office. I was upset most of the day, and I had a difficult time taking care of the customers that day.

Another hot summer day during 1984 I was coming back from lunch and I had removed my jacket because of the heat. I always wore a blazer or a business suit at work. As I entered the showroom, Roger was on the floor, along with several of the salesmen and some customers.

He pointed at me and he said, "From the looks of Pat's nipples, it's either cold out or she's horny, and we know it's not cold out." One of the salesmen said, "Roger, I can't believe you'd talk to her like that." I was once again humiliated and considered just quitting then and there, but I knew that I couldn't afford to do that, literally.

One day Roger was going out after work and his wife brought a change of clothes for him. He suddenly appeared at my office door with only a towel around. He said, "Do you dare me to take this towel off?" I told him not to do it and to leave me alone. He came over next to me, and I put my head down and started to turn away. The next thing I knew, the towel was on my desk. He finally took the towel back and left the office.

On several occasions Roger called me in to his office or Ron Keller, the other manager's office, when other men were present. They were salesmen, customer friends of his, or wholesalers. When I entered, he would point at me and say to the other men present, "Have you ever seen such big boobs? Wouldn't you love to grab them?"

I never knew who these men were. My husband was in the automobile business too. He still is. And they might have known him. I was humiliated and worried that my husband might be as well.

One time Roger threw paper clips down the front of my blouse and then attempted to retrieve them in front of the other coworkers.

Other times he would say to me, "Let's go down to the motel with the mirrors and screw around." He also asked me to come into his office and "screw around." He told me that the sofa in his office was actually a hide-a-bed and he wanted to try it out with me.

All this harassment had a strong effect on me. I dreaded seeing Roger in the morning. I knew he would say something to me every day. On a number of occasions he would make me cry. I would always go into the washroom to do it so that he wouldn't see me. I was always edgy, and I had trouble concentrating. I was always afraid of running into Roger. One of the other girls would often bring me coffee so that I wouldn't have to take a chance of running into him at the coffee machine. I felt like I was a prisoner in my own office.

It also affected me physically. Sometimes the harassment would give me migraines. After one particularly bad incident, my migraine was so bad that I almost passed out. One of the salesmen called my husband to take me home from work. I was too embarrassed to tell my husband what was going on. I knew he would want me to quit. But we really needed the money I was making.

I also have angina now, and the doctor says it's from stress. And I can't prove that it is all from Roger Meacham, but I would say that a good majority of it is. I don't go anywhere without my nitro pills.

In December of 1984 Roger fired me. In my opinion, my dismissal was due to my objections to the constant sexual harassment created by Roger Meacham. Other people at the office had often told me what a good job I was doing. I sued Elmhurst Chrysler-Plymouth in Federal Court for sexual harassment.

Both the trial judge and the circuit court believed that I had been sexually harassed, but they also believed Roger's testimony that he had fired me for other reasons. Because of this, I did not get anything at all for the abuse I suffered.

I think that the final blow was even though I had proven to the court that Roger had sexually harassed me and even though he admitted it under oath, I am now required to pay his court costs.

I have three daughters and three daughters-in-law, all of them raising families. Most of them work outside of the home. I also have 15 grandchildren, ten of them girls. I hate to think of them having to put up with this kind of treatment when they are all ready to seek a career. I hope they will not be subjected to the type of harassment I was subjected to.

Thank you.

Senator METZENBAUM. Thank you very much. That is a very powerful statement. I am only sorry there are not more members of this committee who were here to hear it. I hope that they will have the chance to read your testimony. It is certainly very persuasive and very convincing. I thank you.

I am going to excuse myself and turn the hearing over to Senator Simon, but I do want you to know how much I appreciate the difficult strain we have put you under in coming before us to testify. But we think your testimony is very, very helpful to us. Thank you.

Ms. SWANSON. Thank you.

Senator SIMON [presiding.] I just want to add my commendation, too, Ms. Swanson. Frankly, it takes a lot of courage for you to come in here. It also takes a lot of courage to go into court as you did.

I guess I would address a question to the staff here, if anyone knows, does this bill assist in her kind of situation?

Yes, if you can identify yourself for the record here.

Mr. CACOZZA. I am Albert Cacozza, counsel to the committee.

This bill will allow people in Ms. Swanson's position to seek remedies in the future. When the employee proves that she was sexually harassed, as in this case, she will be entitled to a remedy even though there was another independent, lawful reason for the adverse employment action.

Senator SIMON. OK.

One of the other things that is obviously needed is a support group for people in your situation. You know you are really all by your lonesome out there in this kind of a situation. Right?

Ms. SWANSON. Yes, I am.

Senator SIMON. And so it is not simply a change in the law that I hope we get, but how do we give a little more encouragement to people who are harassed as you have been?

Ms. SWANSON. Well, I think there has to be a way of letting people know that there is something out there they can do. I had a terrible time finding an attorney to take the case. Nobody wanted to touch it.

I finally was very fortunate to find a woman, Elizabeth Hubbard, in Chicago, that did take the case and knew what to do. I wasn't sure what to do. I had gone to the EEOC and they suggested that I get an attorney. And it took me, I would say, 4 or 5 months before I found one who was willing to take it.

But I think the message has to go out to management that they can't get away with it. It is like they are not afraid of title VII. There is nothing there to hurt them. It doesn't cost them anything. So they can do whatever they want and get away with it.

If someone says, "Well, there's a law against that." So what? It didn't cost him anything—it cost me. It not only cost me the humiliation and the time, it cost me money for my attorney and my husband backed me through this whole thing. It took time out of his business to come to court. Money that we couldn't really afford.

And now I have a bill waiting at home for me to pay for Roger Meacham's court costs. And he is very smug about this whole thing. He feels he taught me a lesson.

Senator SIMON. If I may ask how much you are going to be paying for his court costs?

Ms. SWANSON. I believe it's around $1,500.

Senator SIMON. With the status of the present law, without the changes that we are talking about, someone in your situation, working for an insurance company, working anywhere, what would you advise a woman in that situation?

Ms. SWANSON. I'm sorry? What would I advise somebody going through this?

Senator SIMON. Going through, No. 1, should you quit the job no matter what the family situation is? That is always easy to say, but as you were saying, you were the sole support of the family. No. 2, do you go through the legal problems?

Ms. SWANSON. Yes, I think you have to go through the legal problems. I couldn't just let it lie. Yes, it was difficult to go into court, and they tried to put me down on the stand. The cross examination was no picnic, I'll tell you. But I think you have to. You have to do something, because it's like being raped and saying, "Well, I don't want to go through that. I am not going to report it." You have to. You have to at least take that chance that you can stop this person from doing it to somebody else.

Senator SIMON. And stop others.

Ms. SWANSON. And stop others.

Senator SIMON. Right.

Ms. SWANSON. Maybe scaring the others enough to realize that they can't do these things.

Senator SIMON. Ms. Swanson, we thank you very, very much for a powerful statement and for your courage.

Ms. SWANSON. Thank you.

Senator SIMON. We appreciate it.

Our fourth panel consists of some attorneys who will be advising us on the legislation: David Maddux from Los Angeles; Larry Lorber from Washington, DC; Judith Lichtman, who has testified before here, from Washington, DC, with the Women's Legal Defense Fund; and Marcia Greenberger, with the National Women's Law Center.

I understand there was to be a fifth witness on this panel, Ms. Nancy Kreiter of Women Employed in Chicago. She is ill, and her statement will be entered in the record.

[The prepared statement of Ms. Kreiter follows:]

PREPARED STATEMENT OF NANCY KREITER, RESEARCH DIRECTOR, THE WOMEN EMPLOYED INSTITUTE

Chairman Kennedy and members of the Committee, I am Nancy Kreiter, Research Director of the Women Employed Institute, a national organization which conducts research, education, and advocacy programs designed to improve women's economic status. We are affiliated with Women Employed, a 16-year-old membership association of women at all employment levels.

We appreciate the opportunity to appear before you to testify in support of the Civil Rights Act of 1990. We believe that passage of this legislation is critically important in the continuing fight for a discrimination-free work environment for all employees. In addition to restoring the statutory civil rights protections which were weakened by decisions issued during the U.S. Supreme Court's last term, the Civil Rights Act of 1990 also strengthens existing protections available under civil rights laws.

This testimony will specifically address Section 8 of the Civil Rights Act of 1990, "Providing Damages in Cases of Intentional Discrimination."

Over the past 16 years, Women Employed has advised and assisted thousands of women with employment discrimination problems. Each month we counsel approximately 100 women on issues including sexual harassment, pregnancy discrimination, wage discrimination, disparate treatment in hiring and promotion practices. At the policy level, we have monitored the enforcement of title VII by the Equal Employment Opportunity Commission and have shared the resulted of our monitoring efforts with Congressional committees on numerous occasions. We have first-hand knowledge of not only the central role title VII plays in protecting women's employ-

ment rights, but also the ways in which title VII must be strengthened if it is to provide meaningful remedies for victims *and* deter employers from intentional discrimination.

The remedies currently available under title VII include reinstatement to a job if an employee was discriminatorily not hired, not promoted, or fired; injunctive relief prohibition further discriminatory behavior; and/or up to two years of back pay. In far too many instances, these "make whole" remedies do not adequately compensate victims of discrimination. Our experience in counseling victims of discrimination makes it clear that when a woman weighs the possible remedies available to her under title VII against what she knows filing a charge will "cost" her, she often chooses not to file. These costs can include possible retaliation from her employer, including being fired, demoted, or harassed; ostracism by co-workers; being "blacklisted" and never working in a particular field or industry again. Despite the fact that title VII prohibits employers from retaliating against employees who file charges against them, most women know that if an employer discriminated against them in the first place, they will continue to do so.

Of the 1,200 women we counsel each year, we estimate that up to 80 percent choose *not* to file discrimination charges, primarily because it just does not seem worth it. This means that many victims of discrimination receive no compensation for the injuries they have suffered, and employers can continue to engage in unlawful employment discrimination. The following case stories illustrate how the lack of compensatory and/or punitive damages impacts on the decision not to file discrimination charges.

Alice M. was employed in the housekeeping division of a large hotel. When her male co-workers found out that she was pregnant, she became the target of crude jokes, teasing, and humiliation. She complained to her supervisor who advised her to "lighten up and have a sense of humor." When she began suffering from high blood pressure cased by work-related stress, Alice quit her job. Alice called Women Employed to find out what she could do to stop the company from harassing pregnant women and whether she could get her former employer to compensate her for medical bills incurred because of the harassment. When the Women Employed counselor explained that neither of these remedies were available to her under title VII, she decided not to file a charge.

Cathy T. worked in sales. Her boss began pressuring her to put in overtime, by which he meant going to a bar once a week with the five other *male* salespeople in her department where they supposedly went to discuss business. This "overtime" resulted in the men harassing Cathy by touching her, making suggestive statements, and calling her derogatory sexual names. Cathy began suffering from severe anxiety and quit her job. Although she found another job within a month, it was in a less lucrative field than sales and had fewer career opportunities. Cathy decided not to file a charge when she learned that she could not be compensated for the cost of therapy or the impact her forced job change had on her earning potential.

Irene S. was the only female real estate agent in her office. While all of the male agents had large offices and secretaries, Irene's office space was a small walled-off cubicle in a conference room and she had no secretarial help. She discussed this unfair treatment with her boss on several occasions, but to no avail. She called Women Employed to discuss filing a discrimination charge under title VII. When she learned that her remedies under title VII would be limited to improving her working conditions to equal those of her male counterparts, she chose not to file. Since she no longer wanted to work for an employer who intentionally discriminated against her, she quite her job and went to another agency.

Diane S. was employed as an outside insurance claims adjustor and had worked for the same company for twelve years, and had an excellent work record. She was pregnant and planning to take a 6-week unpaid disability leave upon the birth of her baby. During her eighth month of pregnancy, her supervisor informed her that the company would not guarantee that a job would be available for her after her disability leave. Diane knew several employees who had gotten their jobs back after taking disability leaves, and that her supervisor had a male friend in line to take her job as soon as she left on leave. After her baby was born, she called a Women Employed counselor to find out how to file a charge against her employer. She was shocked to find out that the most she could hope for was her old job back. She felt that after 12 years of commitment and loyalty to the company, she should be entitled to punitive damages and compensatory damages to make up for lost career opportunities. She decided not to file and put her time and energy into finding another job with a company that did not discriminate against women.

Jane P. was employed as a sales manager at a large pharmaceutical company for 9 years. Upon returning from a vacation, she found that she had been transferred

and replaced by a male friend of her boss. this was the third time that her boss had replaced a woman with a less experienced man, who happened to be a member of his weekend basketball team. Jane's boss assured her that her change in duties had nothing to do with her job performance. Though Jane continued to be paid the same salary, she was performing less interesting, lower level duties and she was clearly off the "fast track" for future promotions. Jane began suffering from stress and severe depression and had to seek psychological counseling. She eventually quit her job and took a position with another pharmaceutical firm at a lower salary. She called the Women Employed counselor to find out if she could use her former company for damage to her career and for compensation for the expense of her counseling. When she found out that the remedies available to her under title VII did not include punitive or compensatory damages, she decided not to file a charge.

For each of these women, and thousands more like them across the country, the limited remedies available under title VII caused them to choose to quit their jobs rather than file discrimination charges. This means that women who have been discriminated against receive no relief. Their employers, on the other hand, go unpunished and can continue to engage in unlawful, discriminatory practices.

Even when women prove that their rights have been violated under title VII, they still do not receive remedies equal to the losses they have suffered as a direct result of discrimination. The following case stories illustrate this point.

Anita R. was a waitress at a restaurant. She was five months pregnant when her boss told her that she had to start working longer shifts, specifically four extra hours per day. She was the only person on the waitstaff who was told to work the extra shifts and had heard from other restaurant personnel that her supervisor did not want a visibly pregnant woman serving the customers. Anita refused to work the extra hours and was fired. She filed a pregnancy discrimination charge with the EEOC and eventually settled for back wages. However, after she was fired she fell behind on her health insurance, and car payments. She is now paying off medical bills for the delivery of her baby and has a "bad credit" rating. Title VII does not allow for recovery of the non-wage-related expenses she incurred because of discrimination.

JoAnn M. worked in the customer service department for a credit card company and had an excellent work record. Her new supervisor began pressuring her to date him, touching her breasts, and leaving pornographic materials on her desk. When she complained about the harassment, she was put on discrimplinary steps and eventually fired. She became severely depressed and was treated for an ulcer. After filing a charge with the EEOC, JoAnn was rehired a full year later and assigned to a different department. However, she was not compensated for the expense for medical treatment and therapy.

Maria R. graduated from a electro-mechanical technology training program and was hired as an in-house copy machine repairer. Joe G. was hired by the same company after graduating from the same training program. However, Joe was hired to repair copy machines "on-site" at the client's office. The on-site job paid better and offered greater career advancement opportunity than the in-house job. Women had never been hired as on-site repairers. Maria discovered this inequity after she had been with the company for 2 years. A Women Employed counselor told her that, under title VII, she was entitled to two years of back pay to make up for the pay differential, and a promotion to the position of on-site repairer. She was not, however, entitled to compensatory damages for the professional contacts and career enhancement she missed out on as an in-house repairer. Maria filed a charge against her employer, was promoted to the on-site repairer position, and receive back pay. However, she felt cheated for the two years that her career was held back.

The lack of adequate remedies under title VII has an enormous impact on women who have been discriminated against, whether they choose to file charges or not. At the same time, employers have little incentive to stop discriminating against women. When victims of discrimination choose not to file against an employer, the employer has lost nothing. When victims of discrimination do file charges, employers know that they stand to lose relatively little even if they are found to have violated the law. Therefore, employers have little incentive to change discriminatory practices, such as those which prevent women from entering male-dominated, higher-paying fields. The following case stories illustrate that the lack of compensatory and punitive damages available to victims of discrimination severely hampers women's ability to be successful in nontraditional fields and contributes to continuing occupational segregation of women.

Paula J. was the only female working in the computer programming department of a large utility company. The atmosphere of her office was extremely hostile toward women. Her co-workers hung photos of nude women on the walls, told dirty

jokes, and subjected Paula to a variety of harassment including leaving condoms on her desk, sexually explicit materials in her files, and using her as the brunt of sexually degrading jokes. Although she complained to her supervisor, he was unsympathetic and told her that to be successful, she had to act like "one of the guys." After discussing her rights with a Women Employed counselor, she decided to look for a job elsewhere. She did not believe that the men in her office would modify their behavior, even if she received injunctive relief to stop the harassment.

Robin s. was he only female groundskeeper at a zoo. She was always given the dirtiest, least interesting assignments and her male co-workers harassed her continually by asking her about her sex life, discussing her body, and telling sexually explicit jokes when she was within hearing. Whenever she complained to her boss, he said he would tell her co-workers to stop and they would, for about 2 weeks. Then the harassment would start again. After discussing her problem with a Women Employed counselor, Robin decided not to file a charge. Since she often worked alone in isolated parts of the zoo, she was afraid of retaliation from her co-workers. Robin is currently looking for a job in a more "traditional" field.

Our experience has shown us that Paul's and Robin's experiences are similar to those of many women who enter nontraditional, higher-paying fields and experience sexual harassment and other forms of discrimination on the job. Because title VII remedies amount to little more than a slap on the wrist to discriminatory employers, they have little incentive to make the male—dominated work settings more hospitable to women.

We believe that the Civil Rights Act of 1990 addresses critical needs in the effort to eliminate employment discrimination. It will provide victims with the remedies they deserve—remedies that are proportionate to the actual harm they have suffered. Without this, the law will simply not be utilized to the extent Congress intended. Further, we must have remedies that will strongly deter the kind of willful discrimination that we too often encounter in counseling working women. Unless the Congress provides for stronger disincentives in the form of punitive and compensatory damages, the worst employers will continue to victimize women despite the law. Strengthening title VII will not affect equal opportunity employers; it will punish the lawbreakers. The Civil Rights Act of 1990 can make a real difference to the women we represent and to our national commitment to end employment discrimination.

Senator SIMON. I am very pleased to have you here.

Mr. Maddux, we will start with you.

STATEMENT OF DAVID MADDUX, ESQUIRE, SHEPARD, MULLIN, RICHTER AND HAMPTON, LOS ANGELES, CA, ON BEHALF OF THE NATIONAL RETAIL FEDERATION; LAWRENCE LORBER, ESQUIRE, KELLEY, DRYE AND WARREN, WASHINGTON, DC, ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS; JUDITH LICHTMAN, ESQUIRE, PRESIDENT, WOMEN'S LEGAL DEFENSE FUND, WASHINGTON, DC, AND MARCIA GREENBERGER, ESQUIRE, MANAGING ATTORNEY, THE NATIONAL WOMEN'S LAW CENTER, WASHINGTON, DC

Mr. MADDUX. Thank you very, very much, Senator. I appreciate the opportunity to be here and address your committee. I am a partner in a law firm in Los Angeles. I have been practicing law since 1959, which was the year that we in California enacted our California Fair Employment Practices Act, which was the first law in California that prohibited discrimination in employment. A substantial portion of my practice since that time has been involved in employment discrimination, matters before our California State agency, before the Equal Employment Opportunity Commission, and in the State and Federal Courts.

I am appearing here on behalf of the National Retail Federation. I am chairman of its subcommittee on wage hour and equal employment opportunity law. Retailing employs approximately one out of every ten persons in our workforce. We, of course, are con-

cerned about discrimination in employment, and we are vitally interested in this legislation.

I express the views that I express here based on my years of experience representing retailers, many of whom are members of the National Federation.

I would like to talk briefly about section 5 of the bill which deals with the mixed-motive cases. I would like to talk briefly about section 8 of the bill which deals with the so-called penalty phases.

With respect to section 5, the bill, as has been pointed out by the Senators, has the effect of providing that there is a violation of the act when a complaining party demonstrates that a prohibited practice was the motivating factor of any employment decision even though that decision may have been motivated by other factors.

Although that section provides that if the employer establishes that it would have taken the same action, made the same decision in the absence of any discriminatory motive, that party complaining would not be entitled to reinstatement and back pay. Of course, a violation of the act would still be found and the complaining party would be entitled to receive compensatory damages and punitive damages, compensatory damages, including damages for pain and suffering and emotional distress.

Now, this section appears to have been proposed to reverse the effect of the U.S. Supreme Court decision in the *Price Waterhouse* v. *Hopkins* case. And *Price Waterhouse*, as we know, rejected Ann Hopkins as a candidate for partner because of an impermissible motive, as the Court found, sex, and a permissible motive, for poor interpersonal relationships with others in her firm.

The bill that has been proposed in this section would really change the law of the land as it has existed in mixed-motive cases for many years and would impose liability on employers where in all of the cases that have considered this type of issue before no liability would have been imposed.

This doctrine of mixed-motive cases first had its origin in cases under the National Labor Relations Act which prohibits employers from discharging employees for union activities. And the cases arose in the context of someone who was discharged where there was a showing a person was a union activist and the union activity may have been a motive but there may have been another legitimate reason for the discharge.

The National Labor Relations Board, in the *Wright Line* case, articulated the doctrine that the employer in those kinds of cases could avoid a violation of the act by proving that the discharge rested upon the employee's unprotected conduct and by proving that the discharge would have happened in any event.

The board based its decision primarily on a decision of the U.S. Supreme Court in *Mt. Healthy City Board of Education* v. *Doyle*. That was a 1977 case in which the plaintiff was a school teacher. The school teacher had engaged in some First Amendment activity, exercising his right of free speech. And he had been fired.

The case went up to the U.S. Supreme Court, and the U.S. Supreme Court articulated the doctrine that the trial court had erred by not allowing the school board to show that they would have fired him in any event even had he not engaged in the free speech activity.

The *Mt. Healthy* case was a unanimous U.S. Supreme Court decision. The U.S. Supreme Court considered this issue again for the second time in the *Transportation Management* case. That was a case which dealt with the validity of the NLRB's *Wright Line* principle. The U.S. Supreme Court in *Transportation Management* again characterized the situation as one where the employer could prevail; that is, avoid liability altogether by proving by a preponderance of the evidence that the decision that the employer had made would have been made in any event even in the absence of a discriminatory motive.

Price Waterhouse v. *Hopkins*, in deciding that a plaintiff in a title VII case can, in order to prevail, show protected status, played the motivated part in the employment decision and then that the employer can avoid a finding of liability only if the employer could prove that it would have made the same decision had the protected status not been in the picture, was really a case that simply was swimming in the mainstream of longstanding judicial authority on this issue.

When you look at *Hopkins*, which was written by Brennan, joined in by Marshall, Blackmun and Stevens, when you look at the unanimous court in *Transportation Management*, when you look at the unanimous court in the *Mt. Healthy* case, I respectfully suggest that nobody can claim that these are the kinds of decisions that are decisions by a conservative fringe of the court, that these are decisions that were written by those that were bent on setting back the civil rights movement.

We think it is just plain wrong to impose the threat of serious monetary liability arising from general compensatory and punitive damages on employers where they would have taken the same action but for the presence of an alleged discriminatory thought or motive.

These are cases where someone is terminated, they were fired because they stole, the employer has got the burden of proving that despite the fact that he may have had a discriminatory motive, he would have taken the action anyway. The employer in this kind of a case has got to prove that person would have been fired because they stole because we always fire people because they steal. In that kind of case, I respectfully suggest, the plaintiff is not a deserving person.

In a promotion case, an employer is going to have to show that the person was not qualified, was not qualified for the promotion. If the person is not qualified for the promotion and does not get the promotion because they are not qualified, again that is not a deserving plaintiff.

In summary, I believe that there truly is no evil that exists that section 5 is really needed to correct. If I may, I would like to change my subject and make some brief comments concerning section 8 of the bill.

Senator SIMON. If you can, be brief. We will enter the full statements of all the witnesses in the record.

Mr. MADDUX. Section 8 is, of course, the one that provides for jury trials, compensatory and punitive damages. And section 8 provides what we have had out in California since 1982, when our California Supreme Court decided a case that gave claimants in

employment discrimination proceedings the right to recover compensatory damages and punitive damages.

What we have seen out in California has led us to conclude that that aspect of the legislation is not a good idea. What we have seen out in California is that employment discrimination litigation has become driven by the basic plaintiff's lawyer, irrespective of whether they are qualified in the area of employment discrimination law or not. We find that they are driven by hopes of a large jury verdict, large punitive damage verdict, and a contingent fee coming into their pocket.

We find that the procedures and the processes of our State agency are completely bypassed, and instead of seeking investigation, conciliation, the normal things that we find as the cornerstones of title VII, we find in our State situation that it is the race to the court house to get a lawsuit on file and a monetary settlement.

I am very concerned about the proposed legislation creating that kind of a focus under the Federal system, a focus that is away from the commission's historic role in investigating and conciliation and remedying and dealing with the discrimination and the focus shifting to where it is litigation flooding the Federal Courts, driven by the contingent fee plaintiff's lawyer.

I believe I have overextended my time. I appreciate very much the opportunity to testify here today.

[The prepared statement of Mr. Maddux follows:]

PREPARED STATEMENT OF DAVID A. MADDUX, ON BEHALF OF THE NATIONAL RETAIL FEDERATION

Mr. Chairman and Members of the Committee:

I am David A. Maddux, a partner in the law firm of Sheppard, Mullin, Richter and Hampton. I have represented employers in labor and employment law matter for the past thirty years. I started practicing law in 1959, which was the year in which the state of California enacted its California Fair Employment Practices Act which prohibited discrimination in employment. A substantial portion of my practice at all times since has involved employment discrimination matters before both the California Fair Employment and Housing Commission, the Equal Employment Opportunity Commission, State Courts and United States District Courts.

I appear on behalf of the National Retail Federation. I am Chairman of its subcommittee on Wage, Hour and Equal Employment Opportunity Law.

The National Retail Federation is the nation's largest trade group which speaks for the retail industry on matter of governmental and public policy. Created by recent merger between the American Retail Federation and the National Retail Merchants Association, the organization represents the entire spectrum of retailing, including 27 national and 50 state retail associations. In addition, the Federation membership encompasses over one million U.S. retail establishments employing nearly 16 million people and accounts for more than one-quarter of the GNP.

I greatly appreciate this opportunity to appear before you and testify on the Civil Rights Act of 1990. The views I will express are based primarily upon my years of experience representing retailers, many of whom are members of the National Retail Federation, in employment discrimination matters.

The Bill has been publicized as a response to recent "conservative" attacks by the U.S. Supreme Court upon Civil Rights in employment. In fact, its scope goes far beyond the few recent decisions involving discrimination in employment decided at the end of the last term. In reality it undoes and implicitly overrules a decade of the Court's Title VII decisions. Much of the precedent which this proposed legislation will overturn was written and concurred in by the least conservative members of the Court.

Comments Concerning Section 4 of the Bill

The practical effect of Section 4 will be to codify and drastically alter traditional disparate impact analysis. Under the Act as amended, a complaining party could

establish a prima facie case simply by demonstrating that a "combination of employment practices or an overall employment process" had a disparate impact upon a protected group. The employer would then have the burden to produce evidence and prove by a preponderance of the evidence that the practice or process in question was "essential to [employees'] effective job performance." No other "business necessity" could be used to defend the practice or process.

At the same time, the plaintiff would have no burden to demonstrate which practice among a group of practices resulted in the disparate impact. Instead, the employer would have the burden of producing evidence and proving with a preponderance of the evidence that none of its practices or process had a disparate impact.

Section 4 of the Bill will also overrule *Wards Cove Packing Co.* v. *Atonio*, 109 S. Ct. 2115 (1989) on the premise that it was incorrectly decided. To the contrary, *Wards Cove*, as demonstrated herein, is entirely consistent with long-existing judicial authority interpreting title VII.

In *Wards Cove*, the U.S. Supreme Court began its opinion by reaffirming that in order to make out a statistically-based prima facie disparate impact case, the plaintiffs must prove there is disparity between the racial composition of the qualified persons in the relevant labor market and the persons holding the jobs at issue.

The lower court in *Wards Cove* had erroneously permitted the employees to make out a prima facie disparate impact case by presenting statistics which compared the racial composition of the employer's cannery work force (composed primarily of nonwhites, Filipinos and Alaska Natives) with that of the employer's non-cannery work force (composed primarily of whites). The U.S. Supreme Court easily identified the logical fallacy associated with the lower court's reasoning: "Most obviously, with respect to the skilled non-cannery jobs at issue here, the cannery work force in no way reflected 'the pool of *qualified* job applicants' or 'the *qualified* population in the labor force.' " 109 S. Ct. at 2122 (emphasis in original).

Its holding on this point is entirely consistent with *Hazelwood School Dist.* v. *United States*, 433 U.S. 299, 308 (1977),[1] in which the U.S. Supreme Court held that the "proper [statistical] comparison in a disparate impact case is] between the racial composition of [the at-issue jobs and the racial composition of the qualified . . . population in the relevant labor market." Similarly, in *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 585 (1979),[2] the U.S. Supreme Court held that in the absence of reliable labor market statistics, the courts may look to statistics that measure the racial composition of "otherwise-qualified applicants" for the at-issue jobs.

Secondly, *Wards Cove* perpetuated the long-standing principle that in a disparate impact case the plaintiff must demonstrate the specific employment practice which is claimed to have the disparate impact on protected class members. The Court said:

> "Consequently, on remand, the courts below are instructed to require, as part of respondents' prima facie case, a demonstration that specific elements of the petitioners' hiring process have a significantly disparate impact on nonwhites." 109 S. Ct. at 2125.

Section 4 of the Bill would undo *Wards Cove* by allowing a complaining party to establish that an employment practice or "an overall employment process" (Section 3(o)) is "unlawful when it results in a disparate impact upon a protected group. Since "overall employment process" is such a broad term, an employer could be found liable under the Act as amended based upon statistical disparity that was simply accidental.

Requiring employers to defend against claims that unidentified employment practices violate title VII places them in an impossible position. In order to avoid liability, employers would have no option other than to adopt strict racial quotas at all levels of their organization. This result was by no means the original intent of title VII. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 449 (1975).[3]

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[1] Justice Stewart's opinion for the Court was joined in by Chief Justice Burger and Justices White, Marshall, Blackmun, Powell and Rehnquist, and concurred in by Justice Brennan. Justice Stevens dissented.

[2] Justice Steven's opinion for the Court was joined in by Chief Justice Burger and Justices Blackmun, Stewart and Rehnquist. Justice Powell concurred in part and dissented in part. Justices Brennan, White and Marshall dissented.

[3] Justice Stewart's opinion for the Court was joined in by Justices Douglas and Brennan and concurred in by Justices Marshall and Rehnquist. Justice Blackmun concurred in the judgment. Chief Justice Burger concurred in part and dissented in part. Justice Powell took no part in the consideration or decision of the case.

Wards Cove is also consistent with *Connecticut* v. *Teal*, 457 U.S. 440 (1982),[4] a case in which the U.S. Supreme Court held that an employer could not avoid liability in a disparate impact case simply by relying upon the "bottom line," racially balanced result of an allegedly discriminatory promotion practice. In *Teal*, one part of the promotion process involved a test which had a disparate impact on minorities. Analogously, in *Wards Cove*, the U.S. Supreme Court held that employees who *challenge* an employment practice should not be able to establish a disparate impact case simply by showing racial *imbalance* "at the bottom line."

The point is simple. If an employer cannot avoid liability by resting upon a favorable "bottom line" result, an adversely affected employee should not be able to prove liability solely by showing an unfavorable "bottom line" result. The real issue is whether a particular employment practice or selection device has a prohibited effect on the protected class. It will be impossible for the Courts to properly decide this issue if the plaintiffs can continue to hide it.

Furthermore, the *Wards Cove* Court's holding that the burden of proof remains with the disparate-impact plaintiff at all times is perfectly consistent with prior precedent. *See, e.g., Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 108 S. Ct. 2777, 2790 (1988) (O'Connor, J.); *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 256–58 (1981); [5] *Croker* v. *Boeing Co.*, 662 F.2d 975, 991 (3d Cir. 1981). Section 4 of the Bill will overrule these cases. It is also contrary to Fed. Rule of Evid. 301, which clearly provides that a shift in the "burden of going forward with evidence" does *not* impose on a party "the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast."

Curiously, the proposed amendment says nothing about a complaining party's option under existing law to challenge a business necessity defense that has been put forth by the responding party. This option is clearly reaffirmed in *Wards Cove*. In fact, it has been long established that the complaining party may attempt to prove that "other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate business] interests. . . . Such a showing would be evidence that the employer wag using its tests merely as a 'pretext' for discrimination." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975). The Act as amended is silent regarding this element of traditional disparate-impact analysis.

In addition, proposed Section 703(k)(2) provides that "[a] demonstration that an employment practice is required by business necessity may be used as a defense only against a claim under this subsection." The term "required by business necessity" is defined in proposed Section 701(o) (Section 3 of the Bill) as "essential to effective job performance." This definition severely limits the business necessity defense in disparate impact cases.

There are many instances in which employers have nondiscriminatory business reasons for taking of action. It would be highly intrusive and simply bad public policy to inflict liability upon employers by restricting the "business necessity" defense to situations in which the employment practice is "essential to effective job performance." For example, if the Bill is passed in its present form, employers could be liable thereunder whenever they effect a reduction in force for economic reasons that results in a disparate impact upon protected employees. Thus, a race-neutral reduction in force could be cast pursuant to proposed Section 703(k)(1)(A) as an "employment practice" resulting in a disparate impact on the "basis of race, color, religion, sex, or national origin." This would be true even if, for example, the reduction in force arose from contracting out a function which resulted in a large savings for the employer.

In one recent case, *Spaulding* v. *University of Washington*, 740 F.2d 686, *cert. denied*, 469 U.S. 1036 (1984), certain past and present members of the University of Washington School of Nursing faculty challenged the University's compensation practices under 42 U.S.C. 1983, the Equal Pay Act and Title VII of the Civil Rights Act of 1964. The plaintiffs alleged the University's compensation practices discriminated against them on the basis of sex.

The Court of Appeals affirmed the lower court's dismissal of plaintiffs' claims in part on the ground that the employer was constrained by market forces in setting its wages. The court opined:

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[4] Justice Brennan's opinion for the Court was joined in by Justices White, Marshall, Blackmun and Stevens. Chief Justice Burger and Justices Rehnquist and O'Connor joined Justice Powell's dissenting opinion.

[5] Justice Powell wrote the opinion for a unanimous Court composed of Chief Justice Burger, and Justices Brennan, Stewart, White, Marshall, Blackmun, Rehnquist and Stevens.

> "For title VII purposes, simply labelling an employer's action 'policy or practice' is not sufficient. What matters is the substance of the employer's acts and whether those neutral acts are a non-job-related pretext to shield an invidious judgment. [¶] Every employer constrained by market forces must consider market value in setting his labor costs. Naturally, market prices are inherently job-related, although the market may embody social judgments as to the worth of some jobs. Employers relying on the market are, to that extent, 'price takers.' They deal with the market as a given, and do no meaningfully have a 'policy' about it in the relevant title VII sense. Fringe policies, which are discretionary, are altogether another matter. Additionally, allowing plaintiffs to establish reliance on the market as a facially neutral policy for title VII purposes would subject employers to liability for pay disparities with respect to which they have not, in any meaningful sense, made an independent judgment." 740 F.2d at 708.

As the Ninth Circuit readily recognized in *Spaulding*, uncontrollable market forces can result in actions by an employer that have a disparate impact upon a protected class of employees. Under the amended Act, however, the University of Washington would probably be found liable, notwithstanding the fact that it engaged in no act with respect to the complaining parties. This result is even more certain given the vague and overly broad definition of "group of employment practices" as "an overall employment process." Proposed Section 701(n) (Section 3 of the Bill).

Another example arises from *Wambheim* v. *J.C. Penney Co., Inc.*, 705 F.2d 1492 (9th Cir. 1983) in which the Ninth Circuit considered whether or not Penney's "head-of-household" rule which allowed employees to obtain medical and dental insurance for a spouse if the employee earned more than half the couple's combined income violated title VII.

Although the rule clearly had a disparate impact on female employees the Court affirmed the trial court's decision that the major cost considerations involved established a legitimate business justification for the rule.

The Bill as proposed would compel a contrary holding and the result would ignore the economic realities of the situation.

As these examples demonstrate, there is a plethora of situation in which preservation of a broader business necessity defense is compelled by sound public policy. Congress cannot predict, as it sits here today, the many situations in which an employer may have legitimate nondiscriminatory business or public policy reasons for adopting employment practices that may have a disparate impact upon one group or another.

Comment Concerning Section 5 of the Bill

The practical effect of Section 5 of the Bill is to provide that a violation of the Act is established when the complaining party demonstrates that a prohibited practice was a motivating factor of any employment decision even though the decision was motivated by other factors. The section further provides that if the responding party, usually the employer, "establishes" that it would have taken the same action in the absence of any discrimination, then the complaining party would not be entitled to such remedies as reinstatement and back pay.

On the other hand, even though the respondent establishes that it would have taken the same action in the absence of any discrimination, under Section 8 of the Bill it will still be liable to the complaining party for general compensatory damages (including pain and suffering and damages for emotional distress) and punitive damages, all of which can be awarded by a jury.

This Section has been apparently proposed to reverse the effect of the United States Supreme Court decision in *Price Waterhouse* v. *Hopkins*, 109 S. Ct. 1775 (1989). It would however, in reality, change the law of the land as it has existed in "mixed motive" employment discrimination cases for many years, and would impose on defendant employers the burden of general compensatory and punitive damages in circumstances where *no liability at all* would have been imposed under long-standing legal precedent.

The so-called "mixed motive" doctrine arose in the context of Section 8(a)(3) of the Labor Management Relations Act which made it unlawful to discriminate against employees based on their union activities or sympathies. The National Labor Relations Board in *Wright Line, Inc.*, 251 NLRB 1083, 105 LRRM (BNA) 1169 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), held that the General Counsel of the National Labor Relations Board had the burden of proving that the employee's protected conduct was a substantial or motivating factor in the employees discharge. The Board then held that if there was another legitimate reason for the discharge the employer could avoid a violation of the Act by proving

that the discharge rested on the employee's *unprotected* conduct, and that the discharge would have occurred in any event.

The National Labor Relations Board's *Wright Line* principle was given express approval by the United States Supreme Court in *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983). In *Transportation Management*, the Court held that even though the General Counsel of the Board met his burden by proving that the employee's protected conduct was a substantial or motivating factor in the discharge of the employee, the employer could avoid a *violation* of the Act by proving by a *preponderance of the evidence* that the discharge rested on the employee's unprotected conduct as well and that the discharge would have occurred in any event. The Court, relying on National Labor Relations Board precedent, characterized the doctrine as one where the employer could prevail by presenting an "affirmative defense", which under normal rules of burden of proof, placed upon the employer the burden to sustain its affirmative defense by a *preponderance of the evidence*. The burden of proving a fact by a preponderance of the evidence is met when the person having the burden persuades the trier of fact that it is more likely than not that the asserted fact is true.

Transportation Management was in accord with and relied upon in the United States Supreme Court's decision in *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274 (1977), which dealt with the discharge of a teacher and the board of education's refusal to reinstate him for his exercising his constitutionally-protected right to free speech. The U.S. Supreme Court found that the trial court had erred by not determining whether the board had shown by a *preponderance of the evidence* that it would have refused reinstatement in the absence of the teacher's protected conduct.

Thus, *Price Waterhouse* v. *Hopkins*, in deciding that once a plaintiff in a title VII case shows that his or her protected status played a motivating part in an employment decision, the defendant may avoid a *finding of liability* only by proving that it would have made the same decision even if it had not allowed the protected status to play such a role, was simply swimming in the mainstream of long-standing judicial authority on this issue.

Indeed, the *Hopkins* opinion was written by Justice Brennan and joined in by Justices Marshall, Blackmun and Stevens. Justices White and O'Connor concurred. Chief Justice Rehnquist and Justice Scalia joined Justice Kennedy's dissenting opinion. The *Hopkins* plurality joined unanimous courts in *Mt. Healthy*, an opinion participated in by Chief Justice Burger and Justices Brennan, Stewart, White, Marshall, Blackmun, Powell, Rehnquist and Stevens and *Transportation Management*, an opinion participated in by all of the above-named Justices except Justice Stewart who was succeeded by Justice O'Connor in the Court's October 1981 Term.

Thus, it is respectfully suggested that it would be the wrong result to impose the threat of serious monetary liability arising from general compensatory and punitive damages on employers who would have taken the same action but for the alleged discriminatory motive, in the face of holdings requiring a contrary result by all of the Justices who decided *Transportation Management*, *Mt. Healthy* and *Hopkins*.

In addition, there is a question concerning what burden The Bill proposes to place on the defendant by its use of the word "establishes" in describing the employer's burden in Section 5(b) of The Bill. In the definitions section the term "demonstrates" is defined. "Establishes" is not.

It is also respectfully suggested that it is an inappropriate allocation of judicial resources to process burdensome and time-consuming jury-trial litigation where the facts would clearly establish that the employer had a legitimate business reason for its employment decision which would have been made irrespective of the plaintiff's protected status.

One could conjure the simple example of two employees who conspired in a common scheme to steal from their employer. Once the employer found out about the scheme, he would probably terminate both employees. If a jury determined that the employer happened to harbor some wholly unrelated feelings of prejudice against one of the individuals, who happens to be a protected class member, the likely and somewhat nonsensical result would be that he or she would be entitled to recover general compensatory and punitive damages. Of course, the equally guilty non-protected employee would be entitled to nothing. Clearly such a result has no logical support.

Comments Concerning Section 8 of the Bill

The practical effect of the proposed amendment to Section 706(g) of the Act (Section 8 of the Bill) will be to provide for jury trials and compensatory and punitive damages in cases of intentional discrimination. In this connection, it should be noted that essentially all individual disparate treatment cases involve intentional

discrimination. The result of the proposed amendment will be to take federal discrimination cases out of the expert hands of the EEOC and place them in the private hand of litigants and their lawyers. Once such cases are settled with the payment of money, they will be dismissed and the facts surrounding the allegedly discriminatory behavior of the employer will be effectively buried. (It is standard practice in most cases for employers to insist upon confidentiality provisions in settlement agreements). Although the private litigant and his or her lawyer may be better off after the case has been settled, there is absolutely no guarantee that the employer will not continue discriminating against other employees who were *not* party to the litigation.

Punitive and compensatory damages are also available for violations of California's primary antidiscrimination law, the Fair Employment and Housing Act ("FEHA"). *Commodore Home Sys., Inc.* v. *Superior Court*, 32 Cal. 3d 211, 649 P.2d 912 (1982). Unfortunately this has resulted in our standard practice under the FEHA for plaintiffs' attorneys to request a right-to-sue letter and commence a civil action long before the Department of Fair Employment and Housing has had a chance to investigate, conciliate and/or seek redress of claimed discrimination. Similarly, under the Act as amended, plaintiffs' attorneys, driven by a contingent-fee arrangement, will likely seek to by-pass the EEOC entirely and commence litigation in the federal courts. The focus will shift from the remedy of employment discrimination process, which title VII was enacted to accomplish, to a process which creates higher litigation stakes fueled by large dollar contingent fee awards. An additional likely result will be a sharp increase in federal court jury trial litigation which will further burden the federal court system.

Further, the proposed amendment to Section 706(g) of the Act contains *no* definitions for a jury to look to in deciding whether to award punitive damages against an employer. The lack of a clear definition as well as the relatively low standard of proof (preponderance of the evidence as contrasted with "clear and convincing evidence" in California) will leave an employer without an understanding of the kind of conduct it should avoid in order not to be punished by an award of punitive damages.

Additional problems created by Section 8 of the Bill arise from the fact that it would impose compensatory damages and punitive damages on top of an existing remedial scheme which already grant to successful plaintiffs the right to recover lost wages, back pay and reinstatement or front pay.

Since the issues of title VII violation and reinstatement or front pay (where reinstatement is not feasible) are issues for the court—not the jury—while compensatory and punitive damage claims are jury questions, a serious and complex issue involving judicial economy arises. The Act provides absolutely no guidance as to how to avoid the possibility of inconsistent results as between judge and jury.[6]

Comments Concerning Section 9 of the Bill

The practical effect of Section 9 of the Bill is to prohibit a "waiver" of attorney's fees as a condition of settlement of a title VII action. As a result of proposed Section 706(k), it is likely that settlement of actions that have been commenced under the Act as amended will be significantly discouraged. It has long been the practice of parties in employment discrimination suits to combine a settlement of all claims, as well as any attorney's fees, into a lump-sum figure. Generally, the defendant provides the plaintiff and his or her attorney with a check and leaves it to the plaintiff and the attorney to divide the proceeds. The Act as amended prohibits the "waiver" of attorney's fees as a condition of the settlement. This provision will likely create tremendous uncertainty regarding appropriate attorney's fees at a stage in the proceeding when both parties are earnestly seeking to conclude litigation.

It is foreseeable that although the parties in a particular action may agree upon the amount of money the defendant should pay the plaintiff in settlement of his or her legal claims, the parties may be thousands of dollars apart with respect to the amount of attorney's fees the plaintiff's attorney should receive. Disagreements between the parties (and their lawyers) about this issue will inevitably end up before a federal judge who will have to decide, among other things, the reasonableness of the fees after reviewing in detail all the time the plaintiff's attorney has put into the case and his or her relative experience in the area. This provision will likely create rancor between the attorneys, just as the parties have come to an understanding as

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[6] This problem has been resolved by some of the circuits which have addressed it in the context of combined Title VII and Section 1981 actions. They generally hold that the jury's factual determinations on the Section 1981 claims control. *See, e.g., Sherman* v. *Burke Contracting Inc.*, 891 F.2d 1527 (11th Cir. 1990); *Wade* v. *Orange County*, 844 F.2d 951 (2d Cir. 1988).

to the value of the case. There do not appear to be any overriding public policy reasons for encouraging attorneys to have more of a monetary stake in the outcome of these cases than they already have. No evil exists which this Section is needed to correct.

I appreciate the opportunity to testify before the committee and I would be pleased to answer any questions you may have.

March 26, 1990

Honorable Edward M. Kennedy, *Chairman,*
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20518-6300

DEAR SENATOR KENNEDY: Reference is made to your kind letter of March 15, 1990 and to the thoughtful and relevant questions propounded by Senator Jeffords.

My response on behalf of the National Retail Federation ("the Federation") is as follows:

Question No. 1: "Your testimony is clear on the point that you disapprove of the S. 2104 definition of 'business necessity' as 'essential to job performance.' [Dothard]. Would your opinion be different if the definition of business necessity read:

—Having a manifest relationship to the employment in question?; [*Griggs*]

—Having a tight fit between the challenged criterion and the actual demands of the job? [*Aguilara* [*sic*] v. *Cook County*]

—Having an overriding legitimate business purpose? [*Lorillard*]"

Answer to Question No. 1: As they are used in Section 4 and defined in Section 3, the terms "required by business necessity" are far too narrow. The Bill restricts the business necessity defense to those situations in which the challenged employment practice is "essential to effective job performance." Therefore, even if the employer has a legitimate business reason for engaging in a neutral employment practice or practices, it will be deprived of a defense if it cannot show that its actions were essential to guaranteeing the effective job performance of its employees.

A fundamental problem with the Bill's definition of business necessity is that its focus is upon employment practices which result in the rejection of protected persons from being hired, promoted, or placed into particular jobs or positions.

There are many other employment decisions that are made in order to achieve efficient or cost effective business operations and which might have a disparate impact on protected class members. Such decisions may have nothing to do with "effective job performance." Some examples include terminations, layoffs, plant shutdowns, compensation practices, benefit policies, etc.

Under the Bill as presently worded, there is no defense to such actions if they happen to have a disparate impact on protected class members and are not "essential to effective job performance." Such a result would seriously impede normal business operations as they are conducted today.

Three of the opinions referenced in Senator Jeffords' Question No. 1 (*Dothard* v. *Rawlinson*, 433 U.S. 321 (1977); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); and *Aguilera* v. *Cook County Police and Corrections Merit Board*, 760 F.2d 844 (7th Cir.), cert. denied, 474 U.S. 907 (1985)) involved situations in which the employers happened to rely upon a business necessity defense that was related to job performance: *Dothard* involved the discriminatory impact of height and weight restrictions upon female correctional counselors; *Griggs* involved the discriminatory impact of educational and testing requirements upon black employees; and *Agauilera* involved the discriminatory impact of a high school diploma requirement upon an Hispanic jail guard.

However, in none of those cases did the court purport to *limit* the business necessity defense to situations in which the challenged employment practice was essential to job performance. In fact, each of the cases features expansive language regarding the business necessity defense: "[The practice must] fulfill a genuine business need," *Griggs*, 401 U.S. at 432; "[the practice must be] 'essential to safe and efficient' conduct of the employer's business," *Aguilera*, 760 F.2d at 846 (quoting *Dothard*, 433 U.S. at 331 n.14).

Other opinions have similarly defined business necessity more broadly than Section 3(o) does. *See, e.g., Nashville Gas Co.* v. *Satty*, 434 U.S. 136, 143 (1977) (citing *Dothard* and *Griggs*) ("If a company's business necessitates the adoption of particular leave [of absence] policies, Title VII does not prohibit the company from applying these policies to all leaves of absence, including pregnancy leaves; Title VII is

not violated even though the policies may burden female employees"); *Watson* v. *Fort Worth Bank and Trust*, 487 U.S. 977, 108 S. Ct. 2777 (1988) ("We do not believe that disparate impact theory need have any chilling effect on legitimate business practices," *Id.* at 2788; "the defendant has [the] . . . burden of producing evidence that its employment practices are based on legitimate business reasons," *Id.* at 2790).

In *Washington* v. *Davis*, 426 U.S. 229 (1976), the U.S. Supreme Court held that the use of a written personnel test which was administered to determine whether applicants to the District of Columbia Police Department had acquired a particular level of verbal skill did not violate Title VII, notwithstanding the fact that it had a disproportionate impact upon blacks and was not directly related to job performance. The Court agreed with the district court that it was sufficient that the test "was directly related to the requirements of the police training program and that a positive relationship between the test and training-course performance was sufficient to validate the former, wholly aside from its possible relationship to actual performance as a police officer." *Id.* at 250.

In light of these authorities, it is the Federation's opinion that "business necessity" should not be defined in the statute at all and that the common law as it has already developed in this area should remain undisturbed. However, if the Committee believes that a definition for "business necessity" is needed, that definition should be something like: "[The practice must fulfill a genuine business need" (*Griggs*) or be "based on legitimate business reasons" (*Watson*).

Question No. 2: "Would Section 4 of the Bill be acceptable to you if the definition of business necessity was removed altogether? Please explain."

Answer to Question No. 2: In this Question, Senator Jeffords asks if the Federation's opposition to Section 4 is limited to the use of the term business necessity as defined in Section 3(o). It is not. As more fully explained at pages 2 through 11 of my written testimony (submitted to the Committee on February 27, 1990), our opposition to Section 4 goes beyond the criticism of the business necessity defense outlined above.

We believe that *Wards Cove Packing Co.* v. *Atonio*, 109 S. Ct. 2115 (1989) was correctly decided and that the opinion is consistent with Title VII opinions from the Court that extend back more than a decade.

Furthermore, Section 4 relieves the complaining party of having to identify the specific practice (among a group of practices) which has resulted in the alleged disparate impact. After a prima facie case is made out, the employer is placed in the nearly impossible position of having to prove that none of its employment practices contributed to the alleged disparate impact and/or that each of its practices is required by business necessity. This shifting of the burden of proof puts every employer in the position of having to prove its "innocence" whenever an employee points to an employment practice or simply the "overall employment process" that has allegedly resulted in a statistical disparity in the employer's work force.

The paradoxical effect of Section 4 will be to create a greater burden for the employer in cases involving disparate impact (i.e., situations where there are *neutral* employment practices that adversely affect protected employees) than in cases involving disparate treatment (i.e., situations where there is *intentional* discrimination). This is true, because it is well established that in disparate *treatment* cases, the employer's only burden after the employee establishes a prima facie case is to *produce evidence* that "the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant *need not* persuade the court that it was actually motivated by the proffered reasons." *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 254 (1981) (emphasis added).

It is incongruous that employers will have a more onerous burden (one of proof/persuasion as opposed to one of producing evidence) in cases in which they have engaged in no intentionally discriminatory conduct than in cases in which they have. Yet, that is the practical effect of Section 4.

Question No. 3: "Do you agree that the showing to be made by an employer on business necessity is in the nature of an affirmative defense?

—*If not* an affirmative defense, what is it?

—*If so*, isn't it traditional practice to place the full burden of proof on the party asserting the affirmative defense?

—Why then should it be different here?"

Answer to Question No. 3: No, the showing required is not and should not be in the nature of an affirmative defense. Rather, it is merely an employer's burden to *produce* evidence of a legitimate business reason for its practice. It is the position of the Federation that the burden placed upon the employer by Section 4 to "demon-

strate" (i.e., to produce evidence *and* persuade the trier of fact (Section 3(m)) that the challenged practice or "overall employment process" is required by business necessity is inappropriately high. As explained in the response to Senator Jeffords' Question No. 2, there is no logical basis for imposing a *greater* burden upon the employer in cases of disparate impact than in cases of disparate treatment.

It is unquestionably analogous to the employer's assertion of a legitimate, nondiscriminatory reason for its action in a disparate treatment case. In a disparate treatment case, once the employer has produced evidence of (but not necessarily proved) a legitimate, nondiscriminatory reason for its actions, the burden shifts back to the plaintiff to resume his or her burden of proof and to demonstrate the employer's proffered reason was a pretext for discrimination. Similarly, in a disparate impact case, the employee has the option of demonstrating a less discriminatory alternative to the business justification proffered by the employer.

Obviously, these two models are very similar to one another. It is difficult, if not impossible, to imagine a reason why the employer's burden should differ or, more to the point, why the employer's burden should be greater in cases involving alleged disparate impact.

Question No. 4: "Other than your problem with the definition of business necessity, do you object to Sec. (k)(1)(A) [which states that a violation is established when disparate impact is shown and respondent fails to demonstrate business necessity]? Please explain."

Answer to Question No. 4: To the extent Section 4(k)(1)(A) seeks to codify *existing* disparate impact analysis, we have no objection to it. As defined in Section 3 and used in Section 4, however, we object to the terms "business necessity" and "demonstrates" for the reasons already discussed herein. We would not object to Section 4(k)(1)(A) if "business necessity" were defined as suggested above in the response to Senator Jeffords' Question No. 1 and if the burden of proof were not placed upon the employer.

Question No. 5: "Would it ever be appropriate in your opinion to lump employer practices together for purposes of disparate impact litigation?

—Under what circumstances?

—What about where, for whatever reason, it is not possible to segregate individual practices out of an integrated or closed process?"

Answer to Question No. 5: As pointed out in the written testimony and in response to Question No. 2, the Federation believes that the *Wards Cove* requirement that the plaintiff must identify the specific elements of the employment process which are claimed to have an adverse impact on the protected class is correct.

To the extent that the provisions of Section 4 of the Bill combined with the definitions of Section 3 dispense with this requirement, we believe that it creates an undesirable result for the following additional reasons:

a. Fundamental due process requires that a party accused of a wrong be informed of the wrong of which he or she is accused. The Bill would deny employers charged with Title VII violations this right.

b. Requiring plaintiffs to specify the employment practices about which they complain has apparently not denied deserving plaintiffs of a right to redress. This is so for the simple reason that all of the significant disparate impact cases have involved employment practices which the plaintiffs have clearly identified. A few examples include *Watson* v. *Fort Worth Bank and Trust*, 487 U.S. 977, 108 S. Ct. 2777 (1988) (subjective selection process for promotions); *Albemarle Paper Company* v. *Moody*, 422 U.S. 405 (1975) (high school diploma and two tests identified as causing the adverse impact); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) (identifying the requirements of having a high school diploma or passing two written tests as causing a disparate impact). Thus, there is no need for legislation which abolishes this requirement.

c. Allowing a plaintiff to establish his or her case by claiming that the employer's "overall employment process" has resulted "in not enough minorities in the company" would be a most compelling invitation to quota hiring.

For these reasons the Federation believes that it would seldom be appropriate to "lump employer practices together" in cases of disparate impact claims.

Question No. 6: "Is it your position that S. 2104 would reverse that portion of the Wards Cove decision which held that an improper statistical showing had been made [*i.e.*, comparison of cannery vs. non-cannery workforce rather than cannery workforce vs. *qualified* applicants or individuals in the labor force]? (slip opinion at 3-4).

—If so, on what in the bill do you base that opinion?

—Would clarification that the bill does not reverse this aspect of the holding lessen your opposition to the bill?"

Answer to Question No. 6: We are unable to determine whether or not S. 2104 is intended to reverse that portion of the *Wards Cove* decision which reaffirmed a long line of decisions, including *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977), which soundly held that the proper statistical comparison in a disparate impact case is between the ethnic mix in the jobs at issue and the ethnic mix of those qualified persons in a relevant labor market.

This is because the Bill is silent on the subject of proper statistical comparisons. Hence, clarifying language which would indicate that the Bill does not purport to undo *Hazelwood* or that portion of *Wards Cove* would be laudatory.

However, we remain opposed to Section 4 of the Bill for the reasons expressed in the written testimony and the response to the other questions propounded by Senator Jeffords.

Question No. 7: "Is your opposition to this Section [Section 5] based entirely upon the change in Title VII damages proposed in Section 8 or is there another basis?

—If so, what is that basis?"

Answer to Question No. 7: No. The Federations's opposition to Section 5 of the Bill is, as expressed in the written testimony, based upon the fact that *Hopkins* v. *Price Watehouse* is squarely in the mainstream of long-standing United States Supreme Court authority in "mixed motive cases," and hence states the law as it should be.

Thus, Section 5 of the Bill is unnecessary. It would, if Section 8 is also enacted, allow an employee who was convicted of stealing from his employer, and terminated for it, to recover compensatory and punitive damages for his or her termination simply by showing that a motivating factor (no matter how insignificant) in his or her termination was impermissible. This would be the result under the Bill even if the employer could prove that it had a policy or practice of always terminating those employees who were convicted of stealing, and that the employee in issue would have been terminated in any event.

In our opinion, such a result is plainly wrong.

Question No. 8: "Are you aware of any state legislation or rulemaking by state bar associations prohibiting waiver of attorney fees as a condition of a settlement?

—If so, please provide the details of your knowledge on this issue.

—If not, do you believe that the interests of an attorney can be set at odds with the client's interests by this type of condition for settlement? Please explain."

Answer to Question No. 8: We are unaware of any state legislation or state or local bar association rules that address the ethical considerations associated with attorney's fee waivers other than those described in *Evans* v. *Jeff D.*, 475 U.S. 717, 728 n.15 (1986), the opinion Section 9 of the Bill implicitly overrules. *See also Lawyers' Manual on Professional Conduct*, "Fees" ¶ 41:1601 (ABA/BNA 1987).

The *Evans* opinion carefully considered whether a district court had within its discretion the power to refuse to award attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. ¢1988. The U.S. Supreme Court concluded that there was no ethical dilemma for an attorney faced with a favorable settlement offer for his or her clients accompanied by a proposed stipulation waiving attorney's fees. The Court wrote:

> "Plainly, [plaintiffs' attorney] had no ethical obligation to seek a statutory fee award. His ethical duty was to serve his clients loyally and competently. Since the proposal to settle the merits was more favorable than the probable outcome of the trial, [the attorney's] decision to recommend acceptance was consistent with the highest standards of our profession." 475 U.S. at 728 (footnote omitted).

The Court cited the ABA's Model Rules of Professional Conduct 1.7(b) and 2.1 and the Model Code of Professional Responsibility EC 5–1 and 5–2 and concluded that "[g]enerally speaking, a lawyer is under an ethical obligation to exercise independent professional judgment on behalf of his client; he must not allow his own interests, financial or otherwise, to influence his professional advice." 475 U.S. at 728 n.14.

We agree with the U.S. Supreme Court's conclusion in Evans that a fee-waiver provision in a settlement agreement does not represent an ethical dilemma for plaintiffs' attorneys. Moreover, it is our position that a strict prohibition against such waivers such as that provided in Section 9 "would itself impede vindication of civil rights, at least in some cases, by reducing the attractiveness of settlement." 475

U.S. at 732 (citing *Marek* v. *Chesny*, 473 U.S. 1 (1985) and *White* v. *New Hampshire Dep't of Employment Security*, 455 U.S. 445 (1982)).

Personally, and on behalf of the National Retail Federation, I express my sincere thanks for the opportunity to participate in this important legislative process.

Sincerely yours,
David A. Maddux

Senator SIMON. Mr. Lorber, I understand you are also representing the National Association of Manufacturers and the Society for Human Resource Management.

Mr. LORBER. Yes, I am. Thank you, Senator.

My name is Lawrence Lorber. I am a partner in the law firm of Kelley, Drye and Warren, where I practice employment and administrative law. Prior to my entering private law practice, I held several positions in the U.S. Department of Labor, including that of director of the Office of Federal Contract Compliance Programs during the Ford administration.

As you noted, I am testifying on behalf of both NAM and the Society for Human Resource Management. NAM represents more than 13,500 member companies which employ more than 85 percent of all workers in manufacturing. Those members include the very largest and the very smallest of manufacturers.

SHRM is the world's largest association for human resource professionals, with over 44,000 members who work for employers who employ over 53 million American workers.

Both NAM and SHRM come to these hearings with a long record of productive involvement in the development of equal employment policy. NAM was involved in the 1960's with creating employment-related Plans for Progress, the forerunner to our affirmative action programs. And in the 1980's it took the lead in forging the employer consensus, supporting the continuation of affirmative action.

SHRM's involvement is no less impressive. Beginning in the 1960's and 1970's, when it instructed those in the workplace who were charged with employing workers as to the requirements of equal employment. And in 1986, in its amicus brief in the *Johnson* case, which I did write, it provided the professional justification relied upon by Justice Brennan in upholding affirmative action.

We would like to offer copies of that brief for the record and to be made part of these hearings.

Senator SIMON. Without objection.

Mr. LORBER. Employers in the United States find it disconcerting that at the very same time when the consensus is formed that our employment problems will revolve around the need to find trained or trainable employees, that Congress would consider legislation which would build a legal wall perhaps as impenetrable as the Berlin Wall around our employers and create enormous incentives to hamstring the workplace in protracted litigation, serving neither the interests of individuals whom the law would protect nor employers whom the law would regulate.

Proposed section 5 of the draft legislation would deal with the *Price Waterhouse* decision by amending title VII to find a violation whenever an invidious factor was shown to be a motivating factor during the consideration of the employment issue, regardless of the presence or importance of other factors supporting the action.

We find this section particularly puzzling in view of the fact that the *Price Waterhouse* decision itself was properly viewed as a great victory for the civil rights community at the time it was issued, establishing for the first time the concept of mixed motives in title VII and placing upon employers the burden of proving that the employment decision would have been reached notwithstanding the discriminatory factor.

However, by establishing in the statute that the mere presence of such a factor in the employment process is sufficient to establish an irrebuttable finding that the employer violated the law. This draft legislation changes the very nature of the employment process. The mere presence in the mind of the decisionmaker or in the employer's record of any questionable consideration or inartfully phrased concern about an individual would, by the terms of section 5, condemn the employment decision and subject the employer because of section 8 of the bill to a jury trial involving huge potential liability.

This section would serve to put a legal straitjacket around employment decisions, requiring almost a legal thought patrol in every workplace to review performance appraisals, interview notes, managerial discussions of individuals or strategies, to ensure that some errant phrase did not run afoul of the ever-changing definition of intentional discrimination.

This potential would exist for at least 2 years because the legislation, for no apparent reason, will expand title VII's statute of limitations four-fold to ensure that the legislation potential remains like the sword of Damocles over every employer.

We must ask for what reason? In *Price Waterhouse* the Court did not exempt employers. It requires them to meet a difficult burden of proof to overcome the existence of the discriminatory factor. The employer in *Price Waterhouse* did not win. It has been given the opportunity now to attempt to prove that it would have denied Ms. Hopkins' partnership notwithstanding the existence in its records of comments and suggestions which are certainly inappropriate and indeed unlawful if unrebutted.

But section 5 would taint almost every employment decision. I could point to the situation where one individual scored slightly higher on selection tests, was rated somewhat better by reviewing panels, yet was not chosen for a promotion because the employer wanted someone else who was of a different sex or race and where the employer's records indicated that management wanted the choice to be made on the grounds of race or sex. Clearly, race or sex was a motivating factor. Clearly, title VII prohibits such consideration. And were section 5 law in 1986, Paul Johnson would have prevailed in his lawsuit, Diane Joyce would have lost, and the transportation department of Santa Clara County would remain 100 percent male.

Affirmative action, as applied in the workplace, cannot coexist with section 5. The organizations I am representing care about affirmative action, fought to save it, and don't wish to see it nullified so that a plaintiff's lawyer can have a jury determine if Paul Johnson should have been chosen instead of Diane Joyce.

We view with particular concern and amazement the inclusion of jury trials, punitive and compensatory damages in title VII. And I

note parenthetically that under this bill all an individual would have to do to obtain a jury trial, even in a so-called adverse impact case, would be to allege that the practice was intentionally adopted and therefore get within the parameters of the law.

When the Congress enacted title VII, it wanted rapid resolution of employment concerns. It wanted minorities and women on the job, not languishing in the courts. Indeed, since 1965 the Congress, the public, and indeed various EEOC Chairs have publicly attacked the backlogs, devising various schemes, including rapid dispute resolution, no-fault fact-finding and arrest to move the process along. There was no thought then of creating a national employment law lottery where individuals, indeed aggrieved individuals, would await their turn to get into hopelessly crowded courts for a chance at a windfall while they give up the job or promotion they actually wanted.

Our concerns should not be misconstrued. The organizations I represent and the employers who are members of those organizations do not fear the very occasional six-figure verdict which may come in rare instances after protracted litigation. They fear instead the prospect that the protracted legal process which comes with jury trials, compensatory and punitive damages will so tie up the human resources function, so enmesh them in interminable jousting attendant to the litigation process that they will simply have to abandon all efforts at innovative human resource planning.

What employer, faced with this specter, would engage in probing self-analysis to ensure that its various divisions, subsidiaries, or far-flung plants are adhering to required practices when such analysis, leading hopefully to employment reform, will also lead a hovering plaintiff to declare a "mixed-motive violation" and commence litigation which will last for years?

What employer will institute employment criteria to raise the level of its workforce when to do so would be to invite protracted litigation? And where would the EEOC fit into this new world?

I simply do want to note with respect to the *Patterson* decision, we would note that racial harassment violates the law. We would note that the U.S. Supreme Court voted 9–0 in *Vinson* that sexual harassment violates the law, including atmosphere discrimination.

But I would suggest that the U.S. Supreme Court in *Patterson* was faced with the situation which employers are faced with every day: Of a morass of multiple forms for resolution of employment grievances, with lawsuits resting upon different Federal statutes, with different procedural, substantive, or remedial requirements, with Federal courts hearing State statutory or common law claims.

The Court attempted to deal with this unwieldy morass by channeling such actions through the statutory mechanism, title VII, which Congress established to deal with these problems. Perhaps the Court's actions were awkward or stretched larger, but the stated goal of *Patterson* to rationalize the process must be viewed as necessary.

Employers do not fear equal employment. They welcome it as vital to the attainment of the skilled workforce necessary to move the American economy to its most productive phase. The Civil Rights Act of 1990 does not help this process. It promises a future of litigation contests. It doesn't create jobs, it doesn't teach skills.

We therefore urge this committee to move beyond superficial slogans or titles and move toward addressing the real needs of our workplace and the legitimate protections of our workers.

Senator Simon, it is interesting to note we are supposed to testify at the House, so if we could be excused at some point.

[The prepared statement of Mr. Lorber follows:]

Prepared Statement of Lawrence Z. Lorber, on behalf of the National Association of Manufacturers and the Society for Human Resource Management

Mr. Chairman, members of the Committee, my name is Lawrence Lorber. I am a partner in the law firm of Kelley, Drye & Warren. I am submitting this testimony on behalf of the National Association of Manufacturers ("NAM") and the Society for Human Resource Management ("SHRM") (formerly the American Society for Personnel Administration).

The National Association of Manufacturers is a voluntary business association of more than 13,500 member companies and subsidiaries, large and small, located in every state. Members range in size from the very large to the more than 9,000 smaller manufacturing firms, each with fewer than 500 employees. NAM member companies employ 85 percent of all workers in manufacturing and produce more than 80 percent of the nation's manufactured goods. NAM is affiliated with an additional 158,000 businesses through its Associations Council and the National Industrial Council.

The Society for Human Resource Management is the world's largest association for human resource professionals with over 44,200 members representing employers who employ over 53 million individuals. As the leading professional association for human resource managers, SHRM has a vital interest in legislation impacting on almost every aspect of the human resource function.

Both SHRM and NAM have a long background in promoting fair employment practices. NAM's involvement in this area goes back to the 1960s when it was instrumental in promoting Plans for Progress, the forerunner of our affirmative action policies. And its efforts continued through the 1980s when NAM took the lead in establishing the consensus which preserved the policy of affirmative action as a viable component of our nation's employment structure. SHRM's efforts in this area are as equally long-standing. SHRM played a vital role in training the human resources profession to understand and implement the concepts of equal employment opportunity in the workplace when the laws were first passed. In the 1980s SHRM's activities included the preparation and filing of an Amicus Curiae brief before the U.S. Supreme Court in the landmark affirmative action case of *Johnson* v. *Santa Clara County, California*, arguing that affirmative action was a necessary part of our employment system. SHRM's brief, which I prepared, was cited by Justice Brennan as providing the professional justification for affirmative action. Thus, these two leading organizations bring a long and involved background to the current debate over our equal employment policies.

The Civil Rights Act of 1990 represents a massive restructuring and rewriting of our equal employment laws. Presented as a response to certain U.S. Supreme Court decisions of last term, the draft legislation in fact rejects the concept of conciliation and rapid settlement of complaints, which the Congress used as its guidepost in 1964 when title VII was enacted, and assumes that the only resolution of discrimination complaints is in protracted litigation in a federal court system which is already overburdened. We find this thrust particularly ill-conceived at a time when there is almost universal recognition that the problem our economy faces in the 1990s is not too few jobs but too few trained or trainable employees. A congressional commitment of scarce federal resources to increased federal court litigation seems particularly ill-advised when our country faces such pressing employment problems. In the recent annual economic report issued by the President, the employment concerns of America were identified as the necessity to find skilled workers for the available jobs. The President's Report, which follows upon the Workforce 2000 study issued by the Department of Labor and the many private studies focusing on the employee shortage we are facing identifies the trained labor shortage as a grave problem of national proportions.

Our country has long since outgrown the pernicious "luxury" of discriminatory exclusion. In the increasingly tight labor markets of the 1990s, employers inclined

to indulge in discriminatory hiring will pay a high price for it—they will be unable to meet their own need for workers. The protected groups—minorities and women—will comprise the overwhelming percentage of new entrants to the workforce. Employers who are unwilling to hire them for reasons of bias will find themselves increasingly unable to find qualified workers. Therefore, it is ironic that at a time when business necessity dictates open, nondiscriminatory employment practices, Congress is seeking to place greater rigidities on the labor market. We think this would be counterproductive to expanded workforce opportunities. This legislation, however, ignores these pressing problems and focuses single-mindedly on narrow and technical litigation concerns of interest primarily to lawyers.

The Civil Rights Act of 1990 does not profess to create jobs or provide skills. It does, however, promise to vastly increase contentious litigation. Beginning with the several new definitions to title VII, the legislation places employers in a position where they have no reasonable opportunity to offer nondiscriminatory explanations to challenged employment practices. Put into this position, employers will have little choice other than to assure numerical balance in their workforce.

Definitions

Proposed new definition "n" includes the term "group of employment practices" within the scope of title VII. This definition, as applied to both disparate treatment and adverse impact cases, would place the entire range of an employer's employment practices under question without providing an employer with any specificity as to which practice is questionable. The legal inquiry would be changed from an examination of a single suspect practice into an open-ended inquisition of an employer if its total workforce did not reflect some idealized numerical balance suggested by a plaintiff. This new definition rejects long accepted title VII jurisprudence. In *Connecticut* v. *Teal,* Justice Brennan analyzed the various adverse impact cases since *Griggs* and made clear that title VII never required the focus to be placed on the overall number of minority or female applicants hired or promoted.

In *Transit Authority* v. *Beazer,* the U.S. Supreme Court focused on a single identified employment practice. To permit a lawsuit to be based on a "group of employment practices"—perhaps all practices used by a particular employer and to have that lawsuit triggered because the "overall employment practice" results in a workforce that is numerically deficient—is a profound change in the standard for reviewing personnel practices. It will put pressure on employers to assure that their overall employment practices result in a workforce measured by arbitrary numerical standards, and not productivity or ability.

Proposed new definition "o" would find "business necessity" justifying a selection criterion only if that criterion were proven to be "*essential* to effective job performance." This new definition is a drastic change from the definitions first set forth in *Griggs* v. *Duke Power Company* which has become well settled law during the succeeding nineteen years.

In *Griggs* the U.S. Supreme Court first enunciated the theory of adverse impact, and imposed on employers the requirement of showing that a challenged practice was justified by "business necessity". The Court said that the standard of business necessity meant "job relatedness", meaning a selection criterion "having a manifest relationship to the employment in question." The Court in *Griggs* reemphasized congressional intent to allow employers to set their employment standards as high as they wished as long as the business necessity test was met. The various U.S. Supreme Court and appellate court rulings subsequent to *Griggs* have made it clear that "business necessity" requires a showing that the challenged practice is predictive of job performance, correlates to important elements of work behavior, or more generally relates to the specific job functions in question. The proposed new definition of business necessity, would overturn these long-standing precedents and impose an impossible burden on employers.

Understanding that the legal review of employment practices does not even begin until there is proof of a numerical imbalance defined as adverse impact under the proposed legislation, employers would have to show that the suspect practice, or the "overall employment process" (see new definition "n") are not only necessary but are "essential". The judgment as to what is "essential" would not be made by the employer but by a judge or possibly a jury, and then in the context of a numerical deficiency rather than actual business needs. The promise of the Congress in 1964, as enunciated in *Griggs*, that employers could establish their own employment standards so long as the standards were consistent with the employer's own business requirements and equal employment principles will thus be consigned to a footnote describing discarded policy. Rather, the law would require employers to accept bare minimum qualifications or performance levels since they would be the only standards which could possibly meet the "essential" test.

Section 4

Proposed definition "n" discussed above, would abolish the requirement that a plaintiff identify the cause of a statistical disparity. Proposed subsection 703(k) would also overturn those parts of the Court's holdings in *Watson* and *Wards Cove* related to burdens of proof.

The Civil Rights Act of 1990 would permit a plaintiff's cause of action to be based solely on the statistical "bottom line". That is, a plaintiff need not identify one specific employment practice causing an adverse impact, but could complain generally about a group of practices or point to the overall "employment process" to establish the numerical threshold necessary for a showing of adverse impact. An employer would then have the burden of showing that some or all of its practices—depending upon the scope of the complaint—are not causally related to the numerical deficiency. The employer would then be obliged to prove that each of these practices is "essential" to its business. Thus, an employer using a variety of employment practices would have to first parse all of its practices, identify which caused the numerical "discrimination" and then prove that the suspect practice was "essential" to its business.

Proving that some objective selection criterion—such as a college degree—is "essential" to success on a job is difficult enough. But in the context of subjective criteria the task becomes impossible. Completely unrecognized in the bill or the accompanying congressional analysis is the fact that the *Watson* and *Wards Cove* cases dealt with non-standardized subjective practices no heretofore dealt with under the impact analysis. The proposed legislation is built on the faulty premise that every employment practice, including interviews, supervisory ratings and the like, can be reviewed with scientific precision. Unlike the accepted methodology for establishing the job relatedness of objective "pass-fail" instruments or practices such as standardized tests or height-weight standards, where business necessity has never been converted into the legal *sine qua non* which this legislation would mandate, the prospect of proving that it is "essential" to job performance for a candidate to appear "bright" or "motivated" during an interview would be completely unmanageable, as would be the burden when reviewing the multistage hiring process for management trainees, first line supervisors, public law enforcement positions or other such positions. The very complexity of the employer's burden when dealing with aggregated, subjective employment practices would require decisionmaking aimed at numerical balance, rather than business judgment, in order to avoid the crushing costs which would be required to even attempt to defend challenged criteria.

In *Watson* and *Wards Cove*, the U.S. Supreme Court attempted to craft a rational balance allowing long-accepted title VII obligations, and heretofore unquestioned general litigation burdens to coexist with viable productive employment systems. Proposed subsection 703(k) and the new "definitions" would overturn this balance, while leaving employers essentially defenseless to challenges of subjective practices based on adverse impact analysis.

Section 5

Proposed section 5 of the draft legislation would "deal" with the *Price Waterhouse* case by amending title VII to find a violation whenever a discriminating factor was shown to have been a "motivating factor" in any personnel action *regardless* of the presence or importance of other factors supporting the action. Section 5 is here characterized as "dealing" with *Price Waterhouse* since at the time of the decision it was greeted as a major advance by civil rights advocates and was said to represent the first time the U.S. Supreme Court had recognized the well-established concept of mixed motives in the title VII context. The drafters of section 5 clearly intend to expand upon *Price Waterhouse* by finding liability where a discriminatory consideration is a motivating factor as opposed to *the* motivating factor or even a *substantial* motivating factor. Indeed the mere presence in the mind of the decisionmaker or in the employer's records of any questionable consideration or inartfully phrased concern about an individual would, by the terms of the proposed amendment, doom the employment decision. The legislation would preclude an employer's ability to rebut or refute the inference of discrimination by proving that the factor was irrelevant because of the predominant weight of legitimate factors.

One obvious result of this section, were it to become law, would be to require legal review of personnel appraisals, supervisory ratings and similar personnel tools while in draft stage in order to scrub or delete any phrase or reference which could be pointed to as a "motivating factor" and which would thereby subject an employer to absolute liability. Employers would almost have to establish legal "thought police" to measure each consideration of a supervisor against the ever-changing

legal standards of intentional discrimination in order to insulate the employment process.

The argument by the proponents of section 5 that *Price Waterhouse* authorizes "a little bit of discrimination" is specious. The U.S. Supreme Court crafted an appropriate burden shift by requiring employers to do more than merely articulate an explanation for the "taint." Employers were given a difficult burden of proof to avoid liability. The draft legislation "cures" *Price Waterhouse* by abolishing any opportunity for defense. Strangely, the draft legislation seeks to amend § 706(9) by including the *Price Waterhouse* "defense" in that section. The intent of this placement is unclear. Clearer drafting would have new § 703(1) add at its end "except that a respondent will not commit an unlawful employment practice where it establishes that it would have taken the same action notwithstanding the consideration of the prohibited factor."

Section 6

In *Martin* v. *Wilks*, a five justice majority of the U.S. Supreme Court held that where allegedly race conscious promotion decisions were being made as a result of the operation of a prior consent decree, white individuals who were not party to the proceedings which resulted in the entry of the decree could bring suit alleging that the denial of promotions to them was due to impermissible considerations of race. The four dissenters argued that obedience to the dictates of a lawfully entered consent decree should not expose an employer to collateral attack and potential liability. The U.S. Supreme Court was grappling with the competing and equally compelling concepts of affording every individual his or her own day in court with the need to bring finality to litigation.

Proposed section 6 would establish that a person could not challenge the operation of a decree if the person were a party to the proceedings, had notice that the proposed judgment might affect his interests and was given reasonable opportunity to object, or if a court determines that the objections being raised were raised by other persons during the pendency of the consideration of the decree.

Section 6 would leave the adequacy of notice to interested parties as the only grounds available to attack the lawful operation of a decree after it is entered. Apparently it would bring finality to issues even if the underlying decree incorporated race conscious features and was of substantial duration. While employers share the belief that judicial oversight of employment policies not be open-ended and intrusive, we believe that these concerns ought to be tempered somewhat in view of the appropriately strict standards for relief currently followed by the courts in reviewing or imposing race conscious policies. The standards enunciated by the U.S. Supreme Court in *Johnson* v. *Santa Clara County* and *Local 28 Sheetmetal Workers* v. *EEOC* ought to allay concern that affirmative relief will unfairly hinder the expectations of nonparty individuals or that a court will usurp the employer's human resources function.

We do believe that rather than rushing to simply "repeal" *Martin* v. *Wilks*, the Congress ought to take sufficient time to study the issues and consider such possibilities as statutory time limits for an employment consent decree or specifying the scope of the fairness hearing so that adequate notice is in fact provided to all interested or potentially interested or impacted individuals.

Section 7

In *Lorance* v. *AT&T Technologies*, the U.S. Supreme Court held that a challenge to a seniority system allegedly adopted for a discriminatory purpose must be raised at the time the seniority system is adopted (within title VII's limitation period) rather than at the time the system has its discriminatory impact. The Court reiterated its view that there was no viability to the "continuing violation" theory of discrimination in this context. The dissenters argued that Congress never intended absolute immunity for tainted seniority systems and that the decision would foster anticipatory litigation.

While the holding in *Lorance* is relatively straightforward and deserving of careful consideration, the legislative response incorporated in section 7 is wholly out of proportion to the holding in *Lorance* and affects significant expansion of title VII.

Section 7(a)(1) expands the statute of limitations of title VII from 180 days to two years. There was no "adverse" U.S. Supreme Court ruling which triggered this section. There seems to be no rationale for this *fourfold* expansion of the statute of limitations, nor does there appear to have been consideration of other, parallel changes sure to follow, such as the extension of EEOC's record retention rules to two years and other administrative changes. The legislation is also silent as to the impact of this change on cases filed with deferral agencies. The silence with respect to the status of deferral states apparently will allow simultaneous processing of

charges and could create redundant legal actions in different forums. This result would be a direct contradiction of title VII's fundamental purpose to foster conciliation and settlement of cases.

The drafters have apparently given no thought to the ramifications of this proposal on actual employment processes. It is difficult to imagine the benefit in allowing a grievance to fester for at least two years before triggering the investigative and adjudicative processes of title VII. In that long interim, personnel will have changed, managers shifted, perhaps even ownership changed, yet the employer will have to reconstruct dated events in order to respond. Productive employment will be subject to forgotten land mines of forgotten actions when a charge is filed two or more years after the triggering occurrence.

Section 7(a)(2) reinstates the continuing violation theory by starting the running of the statute of limitations only after a questioned practice has adversely affected the aggrieved party. Thus, the proposed legislation has the effect of overturning *United Airlines* v. *Evans* decided in 1977, not 1987. It is simply inappropriate policy to encourage potential plaintiffs to sit on their rights for an extended period. There seems to be no cogent reason for this other than to increase employer exposure.

Section 8

This section would amend title VII to provide for compensatory and punitive damages where intentional discrimination is shown and, consistent with the principle that such damages fall under the definition of "legal" rather than equitable relief, a jury trial would be provided.

As much as any section of the proposed legislation, this section would change the entire structure of our equal employment laws. The issue of a jury trial and extraordinary relief for discrimination was considered by the drafters of the original title VII and rejected for a number of sound policy reasons. Those reasons have not changed.

It was the considered view that discrimination issues should be settled quickly, that the employee achieve make whole relief promptly and that the process avoid interminable delay in crowded federal courts. Further, there was concern that juries might be loath to find for minority or female plaintiffs.

Since 1964, title VII has been interpreted and enforced in a relatively efficient manner, enabling individuals to achieve relief. To the extent there has been criticism, it was that the EEOC was inefficient in conciliating cases and that backlogs were permitted to expand.

Section 8 would not respond to these concerns but would create new problems of vastly increased magnitude. Were this section enacted, any hope of conciliation and settlement through the EEOC would vanish. We would witness instead a national employment law lottery where attorneys would hold out to individuals the promise of six or seven figure judgments, with the accompanying six or seven figure legal fee. The purpose and function of the EEOC would be effectively terminated, and the courts would be inundated with new employment suits.

Nor is this a spectral parade of horrors raised by employers with untold hidden liability. Rather, it reflects the experience in those states with expanding doctrines of wrongful discharge and expanding liability judgments. Employers would be ill-advised to undertake thoughtful self-analysis and corrective action for fear of unleashing a torrent of two-year old "intentional discrimination" litigation with million dollar liability claims. Short of resurrecting the plaintiff's bar, no cogent explanation has been given for this section.

We would also note that the Senate debated this issue when it recently passed the Americans With Disabilities Act ("ADA"). Following long negotiations between the White house and Senate, during which organizations such as SHRM and NAM and the disability community provided input, the Senate rejected the inclusion of compensatory and punitive damages and jury trials for the disabled as inappropriate in the employment title of the ADA. The Senate and the Civil Rights community were correct then. We do not believe that those negotiations were undertaken in other than complete good faith, yet we see a policy reversal in a matter of months. Section 8 has no place in this legislation.

Section 11

This section would require *all* federal civil rights laws to be "broadly construed," effectively providing that the actual statute serve only as the starting point for judicial review rather than providing textual limits on such review. This seems to be a needless invitation to judicial activism and could readily cause confusion. If the "broad construction" were viewed by some to be limiting rather than expanding, we would inevitably have to respond to yet another round of congressional restoration.

The Congress should not invite such activism and thereby subject the law to transient determinations of the meaning of "broad construction".

Section 11(b) appears to abolish, in the context of civil rights, the doctrine that subsequent legislation that is more specific or narrow in design operates to limit prior legislation that is more expansive. If this is the intent, section 11(b) ought to be thoroughly debated. We see absolutely no reason to legislatively fossilize every piece of civil rights legislation and simply add layer upon layer of additional statutory language. Civil rights and equal employment is not such a fragile concept so as to require this type of legislative shield. As the organizations I am representing today showed in the debate over affirmative action, exposure to such debate, whether in the executive branch or the legislative branch, or before the public, will not shrivel the reach of our equal employment policies. There is no place for Section 11 in the proposed legislation.

Section 12

Section 12 of the proposed legislation would overturn the Patterson decision. The Administration similarly has introduced legislation to accomplish this purpose. Rather than legislatively "correct" an admittedly strained judicial interpretation, the Congress ought to meet its responsibility by thoroughly examining the ramifications and underlying rationale of the U.S. Supreme Court's action.

The Patterson case involved alleged racial harassment. Title VII makes racial harassment illegal. The U.S. Supreme Court did not endorse racial harassment. It noted that the remedial provisions of title VII could have been available to the plaintiff. Rather, the Court questioned, perhaps awkwardly, the efficacy of having multiple statutory forums available to remedy discriminatory activities and attempted by its decision to channel such matters through the congressionally-created scheme of title VII. The underlying question which the U.S. Supreme Court attempted to resolve was whether it made sound policy to have such multiple forums. The Congress ought to take the time to examine whether it makes any sense to have such anomalous situations as litigations in which both title VII and § 1981 are at issue and in which the same facts are tried partly before a judge and partly before a jury, either at the same time or on alternate days, in which different procedural rules and statutes of limitations would apply and different remedies would be available. We believe that the Congress ought to examine whether plaintiffs ought to be required to choose an exclusive forum, and whether equal employment litigation ought not be encumbered with parallel federal, state and common law counts. We would urge that considered legislative attention be devoted to examining and addressing the underlying causes of the U.S. Supreme Court's decision rather than rushing to "reverse" the attempt of the U.S. Supreme Court to bring reason to an unnecessarily confused and cumbersome situation.

Conclusion

Contrary to the representations of its sponsors, the Civil Rights Act of 1990 far exceeds its professed aim of "simply" reversing certain U.S. Supreme Court decisions. Rather, the draft legislation will effect a sea-change in the treatment of equal employment complaints, converting every charge into a federal court action; making the administrative process of mediation and conciliation an unused and forgotten option and building up a backlog of cases calling on scarce federal court resources.

The draft legislation also reverses the long-settled concept underlying title VII when it was passed and incorporated in the *Griggs* decision, of letting an employer set its standards as high as it wishes. The legislation would present American industry with the choice of boiling its legitimate employment criteria down to the very few essential elements which would result in a minimally competent workforce or facing lengthy and expensive litigation leading to extraordinary relief in which the statutory deck is stacked overwhelmingly against it. The only other option left to employers is the distasteful one of insuring numerical balance. Finally, the draft legislation ignores the current procedural and statutory impediments to rapid and equitable resolution of employment complaints. Rather than examining the continued viability of multiple forums and multiple statutory basis for employment litigation the legislation merely perpetuates the current unwieldy and inefficient system. The issues raised by the Civil Rights Act of 1990 deserve careful and thoughtful analysis. The apparent rush to pass a bill with a minimum of debate and consideration is an unseemly and inappropriate way of treating civil rights. We urge that this committee reflect upon the issues raised in this testimony and join with America's employers in addressing the pressing issues we all face in the 1990s and beyond.

Senator SIMON. You may be excused. We will submit some questions in writing.

Mr. LORBER. Thank you, Senator.

The CHAIRMAN. Ms. Lichtman, president of the Women's Legal Defense Fund.

We are happy to have you here.

Ms. LICHTMAN. Thank you, Senator. It is very good to be here. I will submit, with your permission, my full statement and supporting memorandum for the record and try to be as brief as I can with my oral testimony.

Let me quickly go to the heart of the objections of the witnesses on this panel who appeared just before me as well as Mr. Ayer's earlier testimony to the inclusion of section 5 in the Civil Rights Act of 1990.

There were really five main points that the opposers of section 5 make to trying to address the inequities that we believe were brought to us by the decision in the *Price Waterhouse* case.

First, they argue that the bill would punish bad thoughts or feelings and not deeds.

Second, they assert that the employer would have no opportunity to defend against charges of discrimination.

Third, they assert that employers would be unjustly subjected to large compensatory and punitive damages awards.

Fourth, they assert that section 5 disrupts settled, longstanding law on mixed-motive cases developed in the labor law and the First Amendment context.

And then fifth, for the first time this morning we heard that section 5 would prohibit the permissible taking into account of race, sex, national origin for lawful affirmative action plans.

Let me just run through my rebuttal to some of those specious arguments, as I find them.

Nothing in section 5 demands a finding of liability for bad or prejudiced thoughts or feelings or—as Eleanor Norton said earlier this morning—or any other part of title VII would so command.

The plaintiffs continue to, under title VII, and indeed must bear the burden of persuading the Court that discrimination played a role in the employment decisionmaking. To prevail, this will have to mean that something more is in the air. The discriminatory conduct or acts of the employer must be concrete. The evidence must be sufficient to demonstrate—a word in the statute itself—that the discriminatory conduct has motivated, in part at least, the decision.

Let's spend a minute or two on the assertion that the employers would have no ability to defend against such assertions. The employer in these cases always have the opportunity to rebut the evidence introduced by the employee plaintiff. The employer may show the acts or conduct in fact did not occur or the evidence is insufficient to establish a discriminatory motive.

But once the court is satisfied that the plaintiff has satisfied her burden or his burden, he or she is entitled under section 5 to a finding of liability.

Let's talk for a minute about remedy. When the plaintiff has met her burden of showing impermissible discrimination motivated, in part at least, the employment decision, the court must then determine what remedy is appropriate.

Under section 5 the employer has another opportunity to demonstrate by a preponderance of the evidence that he would have

made the same decision for legitimate reasons even in the absence of the discrimination.

We believe the word "establishes" in section 5 means that an employer must carry the burden of proof and persuasion by a preponderance of the evidence. It means the same essentially as demonstrate as used in other sections of the bill.

If the employer proves there were legitimate reasons for the decision, he will not have to provide back pay, reinstatement, or the promotion if they were the remedies sought. However, the court may decide other remedies are appropriate to compensate the victims for the discrimination or to eliminate the discrimination from the workplace, such remedies as enjoining the employer from discriminating in the future or ordering changes in personnel policies or practices that contribute to discrimination. To the extent the employee has demonstrated actual compensable harm, she may be awarded damages, but damages are not an automatic remedy even where liability has been established.

In mixed-motive cases, there are fundamental differences in the court's rational for limiting liability in the First Amendment context in the cases that the earlier panel has talked about, such as in *Mt. Healthy* and in some of the labor law cases; in the *Wright Line*, for instance.

This morning Deputy Attorney General Ayer acknowledged that one of title VII's fundamental principles is to eliminate discrimination in the workplace where it is based on the immutable characteristics of race, sex, national origin, or ethnicity.

The court, in *Mt. Healthy* and in the labor law cases, recognizes the possibility that a plaintiff could try to insulate himself from an adverse but legitimate employment decision by engaging in protected activities, with the hopes of inviting the employer's animus toward the activities. The court was clear that in such instances the plaintiff should not be unjustly enriched by obtaining or retaining a job for which they were unqualified.

Women and racial minorities are not in a position to change the fact of who they are, either that they are women or that they are racial minorities or religious minorities. Their very being may invite discrimination as a part of the employment decisionmaking. And when it does, they should be entitled to a remedy under title VII because that is what title VII is all about. The remedy may not be the return of the job or a given promotion, but the law should be made clear that discrimination in the workplace is illegal.

The whole purpose of title VII is two-fold, Senator: It is both to deter discrimination and to provide a remedy for that discrimination. And it is the very purpose of title VII that distinguishes the line of cases under section 1981 which has similar remedial and deterrent aspects to it and title VII from the line of cases that some of the panelists and Mr. Ayer talked about this morning.

Let me spend one minute talking about an answer to I believe an assertion by Mr. Lorber a few minutes ago that somehow or other permissible affirmative action plans, which Mr. Lorber's organizations support, would be undermined.

title VII makes clear that the use of sex, race, color, and national origin or religion is not permissible as part of an employer's affirmative action program. As the U.S. Supreme Court has recognized,

part of title VII's purpose is to encourage employers to examine their own practices to eliminate unlawful discrimination.

Indeed, title VII identifies affirmative action as a lawful remedy. Consequently, the discussion of employer liability under *Price Waterhouse* and the Civil Rights Act of 1990 in no way implicates liability for an employer's permissible consideration of sex, race, or other criteria as part of an affirmative action effort.

I submit to you my full testimony.

Senator SIMON. It will be entered in the record.

Ms. LICHTMAN. I am grateful for this opportunity.

Senator SIMON. Thank you.

[The prepared statement of Ms. Lichtman follows:]

PREPARED STATEMENT OF JUDITH L. LICHTMAN

My name is Judith L. Lichtman. I am President of the Women's Legal Defense Fund, an organization founded in 1971 to assist women in combatting workplace discrimination on the basis of gender. In addition, we are committed to the development of public policy that will allow women to cope with the multiple responsibilities of work and family and to achieve equality and social justice in all aspects of our society. In working toward the goal of economic justice for women, WLDF advocates for strong laws, regulations, and policies to guarantee that women's participation in the labor force, and in society as a whole, is free of sex discrimination.

Mr. Chairman, I am pleased to appear before the Senate Committee on Labor and Human Resources to testify in support of S. 2104, the Civil Rights Act of 1990. Indeed, I am happy to share with you the many reasons why it is essential to enact this bill expeditiously and why it should command the overwhelming support of both Houses of Congress. Although I welcome this opportunity, I also recognize how unfortunate it is that I am not here to ask you to enact bold *new* initiatives to enhance even further the lives of working women and men. Instead I am here to ask you to revisit old ground, to restore and strengthen that which had been quite well established in the law until recently. I am asking that you reaffirm in clear and unassailable terms your longstanding commitment to equal employment opportunity and equal justice under the law for all.

The Civil Rights Act of 1990 introduces no new or revolutionary concepts into title VII law. On the contrary, the proposed legislation would re-establish and strengthen legal principles that have long been a part of the jurisprudence of fair employment. When this bill becomes law, it will send a clear and simple message to the people of this country. Employment discrimination against women, people of color, and religious and ethnic minorities, when proven, will not go unremedied. The remedies available for such proven discrimination will be adequate to compensate the victim for harm suffered and discourage outrageous conduct and practices in the future. Employers will again appropriately shoulder the burden of demonstrating that employment "practices . . . fair in form but discriminatory in operation"[1] are a business necessity or they will be in violation of title VII (a determination that will require the employer to adopt practices that do not result in unlawful discrimination). The enactment of S. 2104 will also send the message that a worker harmed by discrimination once again will have the ability to challenge such conduct and seek redress without being subject to unrealistic statutes of limitation. Finally, the law will provide an orderly remedial scheme to ensure finality of title VII court orders and consistency with the due process guarantees of the Constitution.

Not only will this important message be sent by the passage of S. 2104, its passage will also make clear that Congress has no intention of retreating from its 25-year commitment to equal employment opportunity. Congress made clear its commitment to a workplace free from discrimination in 1964 when it passed title VII of the Civil Rights Act.[2] This began the slow but steady movement toward the elimination of employment discrimination against women, racial, ethnic, and religious minorities. Intentional discrimination and neutral practices with discriminatory effects that locked these groups out of many factories and offices began to give way to equal employment opportunity. The courts contributed to this progress by giving weight to the remedial purposes of the equal employment opportunity laws and by

[1] *See Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).
[2] 42 U.S.C. 2000e, *et seq.*

fairly interpreting the statutory provisions to effectuate those lofty objectives. These efforts were broadened with the passage of the 1972 amendments to title VII [3]—extending the coverage of equal employment laws for the first time to government offices at every level, schools, colleges and universities. We thus began to see those institutions reflect among their employees the diversity that is a hallmark of this country's greatness. Again, in 1978, the Congress extended the reach of the law to ensure that women would not be subjected to discrimination on the basis of pregnancy.[4]

We have come a long way since 1964 in eradicating discrimination in employment. No one doubts that. However, let me assure you that there is yet a great distance to go before we can say that equal employment opportunity truly exists for all in this country. And, can anyone doubt that the enactment of the anti-discrimination laws enacted by Congress in the latter half of this century, demonstrates the depth of this nation's commitment to achieving the democratic ideal that is now being pursued with great vigor in countries all over Eastern Europe. We, as a nation, set the course for a world democratic view that has at its center the right of every man and woman to have a full and equal opportunity to participate in the economic life of the nation, to achieve his or her potential, and to be judged fairly. Are we now to ignore the threat that exists to our leadership in the field of civil and human rights? Will we go backward while others move forward to establish and secure democracy and opportunity in their countries? We cannot.

However, unless this Congress sends a clear message that it will not participate in turning back the clock on the right of all Americans to be free from discrimination on the basis of gender, race, color, ethnicity and religion, it risks relinquishing the leadership that we have earned as a nation in establishing and promoting human and civil rights—leadership that is being emulated in many parts of the world today. This is a risk we, as citizens in a country devoted to equal justice, cannot take.

Make no mistake about it, Senators. The 1989 U.S. Supreme Court decisions at issue here represent a significant departure from the history of progress since 1964 in pursuit of equal employment opportunity. These employment decisions send the message that it is no longer important to protect the rights of women and racial and religious minorities in the workplace. Rather than applying the law to eliminate intentional discrimination and barriers that effectively result in race and sex discrimination, these decisions impede the ability of victims of unlawful discrimination to vindicate the very rights that the antidiscrimination laws seek to protect.

The cost of allowing unlawful discrimination to go unaddressed by the federal government is much too high. It is a cost that our nation cannot sustain without tremendous damage to our economic and moral health. As we move towards the year 2000, the role to be played in the workforce by women, people of color, and immigrants is commanding more and more attention. These groups will comprise a clear majority of the labor pool by the year 2000.[5] The degree to which our country productively utilizes their skills, both potential and actual, in the offices, factories, laboratories, and other employment sites of this country may mean the difference between competing effectively in the world market and falling further and further behind as an economic world power. Gender, race, national origin, and religious discrimination in employment is counterproductive to our national interest—it squanders valuable human resources and imperils the nation's growth and economic viability.

If anyone doubts that women are a crucial segment of the American workforce and will become even more essential in the future, one need only remember that women constituted 45 percent of all employed workers in 1988—women are exactly half of the black workforce and almost 40 percent of the Hispanic workforce.[6] By the end of the century, more than 60 percent of all women will be working and 47 percent of the total work force will be made up of women.[7]

The increase in the number of working mothers is similarly dramatic. Seventy-two percent of all mothers of school-aged children now work outside of the home for

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[3] Equal Employment Opportunity Act of 1972, P.L. 92-261, eff. March 24, 1972.

[4] Pregnancy Disability Amendments Act of 1978, P.L. 95-555, Sec. 1, 92 Stat. 2076:27.

[5] Johnson and Packer, *Workforce 2000: Work and Workers for the Twenty-first Century* (Hudson Institute 1987).

[6] Women's Bureau, Office of the Secretary, U.S. Dept. of Labor, *Twenty Facts on Women Workers*, Fact Sheet No. 88-2, 1 (1988). *See also Workforce 2000* at 85, Table 3-4, predicting women's share of the work force at 45.8 percent in 1990.

[7] *Id.*

pay, an increase from 55 percent in 1975.[8] These women work because they must support themselves and their families. Discrimination thus threatens not only the economic, physical, emotional, and social well-being of these women themselves, but also that of their families.

Why do I think it important to call attention to the plight of these women in the context of the Civil Rights Act of 1990? Because it is clear that we cannot return to the days when there were no effective laws against sex discrimination in employment. We cannot purport to have laws that guarantee freedom from employment discrimination while allowing procedural and technical roadblocks to render vindication of that right nearly impossible.

Collectively, the U.S. Supreme Court decisions addressed by the Civil Rights Act of 1990 have made it more difficult for women and men who have been the victims of unlawful discrimination to prove their cases. For example, the decision in *Patterson* v. *McLean Credit Union* prevents women of color from successfully claiming racial harassment under Section 1981, essentially permitting a whole range of discriminatory acts which are not contemplated in the formation of an employment contract. The Civil Rights Act of 1990 will restore the reach of Section 1981 to allow for a federal remedy for women of color and other racial minorities who are harassed on the job. The Act will further strengthen title VII by providing the mirror image of Section 1981 remedies—compensatory and punitive damages—for cases of intentional discrimination based on gender, national origin, and religion as well as race.

In *Wards Cove Packing Co.* v. *Atonio*, the Court shifted to the plaintiff the burden of showing the absence of any business reason for an employment practice with a discriminatory effect, substantially reducing employees' ability to prevail in "disparate impact" cases. This, for example, reduces women's ability to challenge arbitrary height and weight requirements and strength tests which have unfairly restricted women's access to nontraditional jobs. The *Wards Cove* holding also severely limits plaintiffs' ability to bring "pattern and practice" cases against employers engaging in systemic discrimination, by requiring that the employee prove the discriminatory effect of each and every practice rather than by demonstrating their cumulative discriminatory effect. The Civil Rights Act of 1990 restores women's ability to prove claims of such systemic employment discrimination.

In *Martin* v. *Wilks*, court orders vindicating the rights of women and men to be free of workplace discrimination are left vulnerable and uncertain by allowing nonparties to launch repeated challenges, unrestricted by time limits. The Civil Rights Act of 1990 will restore finality to fair employment litigation by outlining an orderly and fair process for preventing endless collateral challenges to court-approved dispositions.

The U.S. Supreme Court in *Lorance* v. *AT&T Technologies* requires plaintiffs to act on possibly discriminatory policies as soon as they are adopted by their employer whenever there is a mere possibility that they would be affected adversely by such policies in the future. The Civil Rights Act of 1990 removes this unreasonable and unrealistic burden on employees by lengthening the time for filing a discrimination complaint and by allowing this time to be measured from the point at which a discriminatory practice adversely affects the victim.

I have recounted in just the broadest way the damage these decisions have had on established title VII law. As these hearings progress, you will be hearing more of the details from both the victims of discrimination and experts in the field of civil rights and employment law. I would like, therefore, to devote the remainder of my testimony to describing the impact of the Court's decision in *Price Waterhouse* v. *Hopkins*[9] and its implications for future title VII claimants unless corrected by Section 5 of the Civil Rights Act of 1990.[10]

Ann Hopkins was a senior manager at *Price Waterhouse*, a major national accounting firm, when she was proposed for promotion to partnership in 1982. She had brought more business to the firm than any of the 87 other partnership candidates that year (all of whom were men). She generated approximately $44 million dollars worth of business annually. Nevertheless, *Price Waterhouse* decided to "hold over" the decision on her advancement until the next year. That year, her peer

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[8] *Occupational Segregation: Understanding the Economic Crisis for Women* 2 (Chicago: Women Employed Institute, 1988).

[9] 490 U.S. ——, 109 S. Ct. 1775, 104 L.Ed.2d 268 (1989).

[10] Attached as an appendix to my written testimony is WLDF's memorandum, "The Impact of *Price Waterhouse* v. *Hopkins*," which more fully discusses the implications of the U.S. Supreme Court's decision.

review evaluations contained mixed reviews: some praised her for "outstanding performance" while others criticized her "macho" and "abrasive" manner.

The next year, *Price Waterhouse* refused even to propose Hopkins for partnership. One partner involved in the decisionmaking process told her that her "professional" problems would be solved if she would "walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry." She was also told that she needed a "course in charm school" to qualify for partnership.

The district court found that *Price Waterhouse* had unlawfully discriminated against Ann Hopkins on the basis of sex by allowing partners' sex-stereotyped comments to influence the partnership decision. The Court of Appeals affirmed. Both courts determined that an employer who allowed a discriminatory motive to play a part in an employment decision must prove by clear and convincing evidence that it would have made the same decision in the absence of the discrimination.

The U.S. Supreme Court affirmed the Court of Appeals in part and reversed in part. The Court agreed that plaintiff Hopkins' evidence of sex stereotyping was sufficient to carry her burden as to the presence of an impermissible factor, gender discrimination, in the decision-making process. It further agreed that the plaintiff's proof that an impermissible factor played a motivating part in an adverse employment decision shifts the burden to the defendant to show that it would have made the same decision in the absence of the unlawful motive.

Of central concern to plaintiffs who have demonstrated the presence of an impermissible factor, however, is the Court's holding that proof offered by the employer that it would have made the same decision absent its discriminatory motive (e.g., that it would not have hired or promoted the plaintiff anyway because of her lack of qualifications) can defeat a plaintiff's claim of liability altogether. The U.S. Supreme Court plurality held that:

> when a plaintiff in a title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account [11]

It is this holding that carries the potential of severely undermining title VII's protections against even blatant, intentional sex, race, religion, and national origin discrimination in employment. Thus, the U.S. Supreme Court's holding in *Price Waterhouse* threatens to allow proscribed employment discrimination to go unsanctioned. The plurality characterizes the shifting of the burden of persuasion to the employer, following the plaintiff's establishment of intentional and impermissible discrimination, as an "affirmative defense" to a finding of liability.[12] Therefore, under the plurality's formulation, by persuading the fact-finder that it would have made the same decision absent the discriminatory motive, the employer escapes title VII liability altogether.

Congress made clear that title VII is violated whenever sex or race is shown to be an impermissible factor in an employment decision when that law was originally proposed.[13] And, in the past, the U.S. Supreme Court has recognized the twin objectives underlying antidiscrimination laws such as title VII: to deter employers from discriminatory conduct and to redress the injuries suffered by the victims of discrimination.[14]

However, under *Price Waterhouse*, title VII's statutory objectives will be undermined as employers' discriminatory conduct escapes liability and victims of discrimination receive no redress. Unless clarified to be consistent with the legislative purposes of title VII, this decision will result in proven yet unremedied instances of gender, racial, color, religious, and national origin prejudice—prejudice, in effect, excused and condoned by the courts.

If title VII and other fair employment laws are to have any real meaning, then proven victims of discrimination must be able to secure a remedy, while perpetrators of clear discrimination—as manifested in their actions and conduct—must be held liable for their violations. The *Price Waterhouse* decision imperils this principle. Under this ruling, even Ann Hopkins, who exposed the role of sex-stereotyping in *Price Waterhouse's* partnership decision-making process, may receive no relief

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[11] 109 S.Ct. 1775, 1795.

[12] 109 S.Ct. at 1792.

[13] *See* Remarks by Senator Humphrey, 110 Cong. Rec. 13,088 (1964); remarks by Senator Case, 110 Cong. Rec. 13,837–38 (1964).

[14] *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 417–18 (1975).

when the case is ultimately concluded.[15] The viability of antidiscrimination laws thus depends upon Congressional response.

By holding that employers can completely escape liability even where their conduct is clearly in violation of title VII, the Court has provided a way to excuse or condone discrimination. *Price Waterhouse* sends a message that a little overt sexism or racism is okay, as long as it was not the only basis for the employer's action. Without clarification, the result in mixed-motive cases will contradict, and eventually undermine, cases disapproving facial discrimination in hiring. This will only send a message to employers and employees alike that title VII is extremely limited in application, even in cases where there is proof of explicit discrimination. This message clearly subverts title VII's purpose in eliminating impermissible discrimination from the workplace.

The Civil Rights Act of 1990 will not allow impermissible and intentional sex, race, religious, or national origin discrimination to be excused. The bill recognizes that it is the intent of title VII to prohibit such impermissible considerations in making employment decisions. The bill thus provides that in those instances where discrimination has been a motivating factor in an employment decision, there will be a finding of liability. Section 5 of the Act does not impose liability for an employer's discriminatory thoughts; instead, liability attaches only when the plaintiff proves that discrimination was a motivating factor in an employer's decision.

At the same time, the bill recognizes the need to ensure that persons subjected to such discrimination should not be the beneficiaries of remedies to which they are not entitled. Thus, where the employer proves that the same decision would have been made in the absence of the discriminatory motive, section 5 of the Civil Rights Act of 1990 would not permit a remedy ordering reinstatement, hiring, back pay, or promotion. Instead, a court could order, among other things, declaratory relief, injunctive relief, changes in the employment decision-making process, or changes in grievance procedures.[16] These types of relief accomplish the two-fold objectives of fair employment law—they force the employer to disregard characteristics such as race, gender, national origin, and religion while simultaneously vindicating the victim of proven discrimination. Moreover, society as a whole benefits from the elimination of discriminatory conduct from the nation's workplaces.

A review of the cases described in the memorandum attached as an Appendix to this testimony should make clear why it is imperative to enact the legislative proposal embodied in S. 2104. The Civil Rights Act of 1990 is necessary to restore and strengthen the laws that have been instrumental in the struggle to eliminate employment discrimination. As a nation, we have come a long way from the days when jobs could be legally restricted "for men only" and when signs in windows and by water fountains could specify "for whites only." However, women as a group still earn only two-thirds of what men earn and occupational segregation by sex continues to flourish. Employment agencies still steer white workers to the most prestigious and high-paying jobs within corporate America without consideration for the qualifications of nonwhite applicants.[17]

The country has a long way to go yet to make equal employment opportunity a reality for all. Let us not be derailed from our objective—an American workforce and employment landscape free from unlawful discrimination on the basis of sex, race, national origin, color, and religion. Passage of the Civil Rights Act of 1990 will reaffirm this principle and return us to a path of progress towards achieving this goal.

APPENDIX: THE IMPACT OF *PRICE WATERHOUSE* v. *HOPKINS*

I. INTRODUCTION

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[15] Because it determined that the Court of Appeals had erroneously held the defendant to a "clear and convincing" standard in finding title VII liability, the U.S. Supreme Court ultimately remanded *Price Waterhouse* to the district court. 109 S.Ct. at 1795. These further proceedings will allow *Price Waterhouse* to try to show by a preponderance of the evidence that it would have taken the same action absent its impermissible consideration of gender. If it so proves, Ann Hopkins might well receive no relief whatsoever, despite acceptance by all of the courts of her direct evidence of sex discrimination.

[16] If Section 8 of the Civil Rights Act of 1990 is enacted into law, under appropriate circumstances—depending on the nature of the harm caused by the discriminatory conduct—compensatory and punitive damages may be available as a remedy.

[17] *See Sixty Minutes* (CBS television broadcast, February 11, 1990) (New York employment agencies discriminating against better qualified black women and referring white women to executive secretary jobs even though they did not perform as well on typing tests—a skill essential to adequate job performance).

In a 6–3 ruling issued on May 1, 1989, the U.S. Supreme Court in *Price Waterhouse* v. *Hopkins* [1] held that an employer can escape a finding of title VII liability even when it has been motivated by an impermissible factor, e.g., gender discrimination, as long as it can demonstrate that it would have made the same decision in the absence of the impermissible factor.

Generally, a "mixed-motives" discrimination case such as *Price Waterhouse* arises when a plaintiff proves that sex, race, religion, color, or national origin was an impermissible influential factor in the challenged employment decision, while the employer asserts that it would have made the same employment decision based on other lawful motives despite any impermissible discrimination. The significance of this type of case lies in the fact that by definition, it involves employers that are motivated at least in part by factors that are prohibited by title VII.

As a result of the *Price Waterhouse* holding, an employer may now defeat liability completely by showing by a preponderance of the evidence that it would have made the same decision for lawful reasons, even though the plaintiff has demonstrated that intentional discrimination was a factor influencing the decision. Such would be the outcome even in cases involving blatantly discriminatory conduct. Under these circumstances, the employer will not be held legally responsible for proven discrimination. Moreover, the victim will likely end up with no remedy at all.

Price Waterhouse v. *Hopkins: Factual and Procedural Background*

Ann Hopkins was a senior manager at *Price Waterhouse*, a major national accounting firm, when she was proposed for promotion to partnership in 1982. She had brought more business to the firm than any of the other 87 partnership candidates that year (all of whom were men), generating approximately $44 million dollars worth of business annually. Nevertheless, *Price Waterhouse* decided to hold over the decision on her advancement until the next year. That year, her peer review evaluations contained mixed reviews: some praised her for "outstanding performance" while others criticized her "macho" and "abrasive" manner.

The next year, *Price Waterhouse* refused even to propose her for partnership. One partner involved in the decision-making process told her that her "professional" problems would be solved if she would "walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry." She was also told that she needed a "course in charm school" to qualify for partnership.

The district court found that *Price Waterhouse* had unlawfully discriminated against Ann Hopkins on the basis of sex by allowing partners' sex-stereotyped comments to influence the partnership decision.[2] The Court of Appeals affirmed.[3] Both courts determined that an employer who allowed a discriminatory motive to play a part in an employment decision must prove by clear and convincing evidence that it would have made the same decision in the absence of the discrimination.

The U.S. Supreme Court affirmed the Court of Appeals in part and reversed in part. The Court agreed that plaintiff Hopkins' evidence of sex stereotyping was sufficient to carry her burden as to the presence of an impermissible factor, gender discrimination, in the decision-making process.[4] It further agreed that the plaintiff's proof that an impermissible factor played a motivating part in an adverse employment employment decision shifts the burden to the defendant to show that it would have made the same decision in the absence of the unlawful motive.[5]

Of central concern to plaintiffs who have demonstrated the presence of an impermissible factor,[6] however, is the Court's holding that proof offered by the employer

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[1] 490 U.S. ——, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989).

[2] 618 F. Supp. 1109, 1119–20 (1985).

[3] 825 F.2d 458 (1987).

[4] 109 S.Ct. 1775, 1790–91 (Brennan, J.); *id.* at 1799–1800 (O'Connor, J., concurring).

[5] 109 S.Ct. at 1787–88 (Brennan, J.); *id.* at 1795 (White, J., concurring); *id.* at 1798 (O'Connor, J., concurring). The Court reversed the lower courts in holding that a defendant need only prove by a preponderance of the evidence, rather than by clear and convincing evidence, that the same decision would have been made absent consideration of the impermissible factor. *Id.* at 1794–95.

[6] As title VII makes clear, the use of sex, race, color, national origin, or religion is *not* impermissible as part of an employer's affirmative action program. As the U.S. Supreme Court has recognized, part of title VII's purpose is to encourage employers to examine their own practices to eliminate unlawful discrimination. *E.g., Albermarle Paper Co.* v. *Moody.* 422 U.S. 405, 417–18 (1975). Indeed, Section 706(g) of title VII identifies affirmative action as a lawful remedy. Consequently, the discussion of employer liability under *Price Waterhouse* and the Civil Rights Act of 1990 in no way implicates liability for an employer's permissible consideration of sex, race, or other criteria as part of an affirmative action effort.

that it would have made the same decision absent its discriminatory motive (e.g., that it would not have hired the plaintiff anyway because of lack of qualifications) can defeat a plaintiff's claim of liability altogether. The U.S. Supreme Court plurality held that:

> when a plaintiff in a title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account.[7]

It is this holding that carries the potential of severely undermining title VII's protections against even blatant, intentional sex, race, religion, and national origin discrimination in employment.

II. THE U.S. SUPREME COURT'S HOLDING IN PRICE WATERHOUSE v. HOPKINS THREATENS TO ALLOW PROSCRIBED EMPLOYMENT DISCRIMINATION TO GO UNSANCTIONED.

By shifting the burden of proof to the employer at the liability rather than at the remedy stage, this holding allows proscribed employment discrimination to go unsanctioned. The plurality characterizes the shifting of the burden of persuasion to the employer, following the plaintiff's establishment of intentional and impermissible discrimination,[8] as an "affirmative defense" to a finding of liability.[9] Therefore, under the plurality's formulation, by persuading the fact-finder that it would have made the same decision absent the discriminatory motive [10], the employer escapes title VII liability altogether.[11]

Congress made clear that title VII is violated *whenever* sex or race is shown to be an impermissible factor in the employment decision when that law was originally proposed: "What this bill does . . . is simply to make it an illegal practice to use race [or any of the other impermissible characteristics] as a factor in denying employment." [12] There is no doubt that Congress considered impermissible reliance on gender or race in making employment decisions an evil in itself: "The bill simply eliminates consideration of color [or other forbidden criteria] from the decision to hire or promote." [13] And, the U.S. Supreme Court has recognized the twin objectives underlying antidiscrimination laws such as title VII: (1) to deter employers from discriminatory conduct which harms society as a whole; and (2) to remedy the injuries suffered by the victims of discrimination.[14]

Under *Price Waterhouse*, title VII's statutory objectives will be undermined as employers' discriminatory conduct escapes liability and victims of discrimination receive no redress. Unless clarified to be consistent with the legislative purposes of title VII, this decision will result in proven yet unremedied instances of gender, racial, color, religious and national origin prejudice—prejudice, in effect, excused and condoned by the courts.

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[7] 109 S.Ct. at 1795.

[8] While the plurality opinion held that the plaintiff need only prove that the impermissible consideration was a "motivating factor," 109 S.Ct. at 1787–88, 1790–91, the five Justices who concurred and dissented stated that the plaintiff must prove that the impermissible motive was a "substantial factor" in the decision-making process. *Id.* at 1795 (White, J., concurring); *id.* at 1798, 1804–05 (O'Connor, J., concurring); *id.* at 1806 (Kennedy, J., dissenting, and joined by Rehnquist, C.J., and Scalia, J.).

[9] 109 S. Ct. at 1792.

[10] The type of evidence which the employer must introduce in order to sustain its burden of proof is unclear from the opinions. Justice Brennan, writing for the plurality, suggests that: "As to the employer's proof, in *most* cases, the employer *should* be able to present some *objective* evidence as to its probable decision in the absence of an impermissible motive." 109 S.Ct. at 1791 (footnote omitted; emphasis added). However, Justice White, in concurring, posits that "there is no special requirement that the employer carry its burden by objective evidence. . . . [Where] the employer credibly *testifies* that the action would have been taken for the legitimate reasons alone, this should be ample proof." *Id.* at 1796 (emphasis added). In addition, Justice O'Connor, in her concurrence, writes that: "The employer need not isolate the sole cause [the permissible reason] for the decision, rather it must demonstrate that with the illegitimate factor removed from the calculus, sufficient business reasons would have induced it to take the same employment action. "*Id.* at 1804; *contrast Wards Cove Packing Co.* v. *Atonio*, 109 S.Ct. 2115 (1989) (requiring the plaintiff to identify the precise cause of discrimination in a disparate impact context). Finally, Justice Kennedy states that "the Court does not accept the plurality's suggestion that an employer's evidence need be'objective' or otherwise out of the ordinary." *Id.* at 1806.

[11] 109 S.Ct. at 1786.

[12] Remarks by Senator Humphrey, 110 Cong. Rec. 13,088 (1964).

[13] Remarks by Senator Case, 110 Cong. Rec. 13,837–38 (1964).

[14] *Albemare Paper Co.* v. *Moody*, 422 U.S. 405, 417–18 (1975).

As an example of the sort of discriminatory conduct that the *Price Waterhouse* decision would insulate from liability, consider the following scenario: [15] An engineering firm advertises a job opening for an advanced engineer, but ends its advertisement with the words, "Blacks need not apply." A black woman, ignoring the obvious discrimination, applies for the job, but is told that the position has been filled. However, she discovers later that the job actually had not been filled at the time of her application, and that a white man had been hired for the job several days afterward. Under *Price Waterhouse*, the discriminatory employer would escape all liability for its actions merely by demonstrating that it had another reason for refusing to hire the black applicant—for example, if she did not have the requisite graduate degree.

Consider also the following example: [16] Four whites and two blacks are vying for the same job opportunity. The employer's decision-making is highly biased by explicit racial stereotypes. Black candidate "A", the most qualified candidate for the job, becomes disgusted by the denigrating process and departs in an effort to find employment in a non-discriminatory workplace. Black candidate "B" persists in seeking the job, but is rejected. In suing for discrimination, black candidate "B" proves that the process was highly biased due to the use of explicit racial stereotypes. The employer successfully defends the discrimination charge by using the argument that white candidate "C" was objectively better qualified for the job than black candidate "B". Under *Price Waterhouse*, no liability attaches. The discriminatory employer has no incentive to discontinue the harmful practice and black candidate "A" is discouraged from returning to compete for a job opening, although clearly more qualified than white candidate "C". Society loses the benefit of black candidate "A"'s superior skills. Finally, the infliction of harm to both black candidates' emotional integrity and self esteem, aside from the loss of employment prospects, remains unrecognized and unremedied.

A related and specific result of this *Price Waterhouse* analysis is that employers can engage in intentional discrimination, without fear of penalty, against those who possess minimal or questionable job qualifications or whose work performance may not be up to par. Without question, all employers should be free to evaluate job performance and to dismiss or decline to promote employees if performance or job qualifications fall below acceptable levels. However, poor performance or a lack of adequate qualifications should not become an invitation to inflict on these applicants and employees intentional and often blatantly discriminatory behavior.

Indeed, in shifting the burden of persuasion to defendants at the liability stage of the litigation, the plurality ignored a number of lower courts that resolved the issue of the plaintiff's qualifications at the relief stage.[17] In these cases, if the employer proved that the plaintiff was not qualified for the job, then the remedy for the employer's discriminatory conduct was limited to declaratory and injunctive relief, costs and attorney's fees (and, in Section 1981 cases, damages). In so ruling, lower courts recognized that such relief is necessary to deter employers from acting in an overtly discriminatory manner in the future, regardless of whether the ultimate decision not to hire or promote a person is justified in a particular case.[18]

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[15] *See Civil Rights Act of 1990: Hearings on H.R. 4000 before the House Committee on Education and Labor*, 101st Cong., 2d Sess. (February 20, 1990) (statement of Julius Chambers, Executive Director, NAACP Legal Defense and Educational Fund, Inc.).

[16] This example was developed by Sarah E. Burns and Alison Wetherfield of the NOW Legal Defense & Education Fund and appears in their November 5, 1989 memorandum on the *Price Waterhouse* decision.

[17] *E.g. Bibbs* v. *Block*, 778 F.2d 1318 (8th Cir. 1985) (discussed *infra*); *King* v. *TWA*, 738 F.2d 255 (8th Cir. 1984) (discrimination in interview process not cured by employer's legitimate reasons for not hiring plaintiff); *Fadhl* v. *City and County of San Francisco*, 741 F.2d 1163 (9th Cir. 1984) (employer's sex-stereotyped comments and disparate treatment supported a finding of liability; plaintiff's on-the-job errors went only to remedy); *Ostroff* v. *Employment Exchanges Inc.*, 683 F.2d 302 (9th Cir. 1982) (issue of qualifications affects relief ordered—employer should be enjoined against sex-biased treatment in the future regardless of the plaintiff's qualifications); *see also* Brodin, *The Standard of Causation In The Mixed-Motive title VII Action: A Social-Policy Perspective*, 82 Colum.L.Rev. 292 (1982).

[18] The *Price Waterhouse* plurality cited its earlier decision in *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274 (1977), as support for shifting the burden at the liability, rather than at the remedy, stage of litigation. *Mt. Healthy* involved the discharge of a schoolteacher both for exercising his first amendment rights *and* for permissible reasons. The Court there held that once the plaintiff had shown that his constitutionally protected speech was a substantial or motivating factor in the adverse treatment, the employer then had the burden to prove by a preponderance of the evidence that it would have reached the same decision in order to avoid liability for a constitutional violation. 429 U.S. at 287.

Continued

The Eighth Circuit provided one of the clearest examples of this framework in *Bibbs* v. *Block*.[19] In that case, black employee Thomas Bibbs was denied a promotion to a supervisory position in the Agricultural Stabilization and Construction Service (ASCS). Of the seven employees applying for the promotion, all except Bibbs were white. All three members of the selection committee were also white. The member of this committee found to be the "key figure" in the selection process had referred to Bibbs as a "black militant" and had referred to another black employee as "boy" and "nigger." On the basis of entirely subjective criteria, the committee unanimously selected a white candidate for the promotion.

The district court found that Bibbs was not selected, at least in part, because of his history of disciplinary and interpersonal problems on the job, and thus denied his claim. The Eighth Circuit, however, found the employer liable for a title VII violation. It remanded the case for a determination of remedy, instructing that the promotion and back pay were to be awarded only if the employer were unable to prove that it would have made the same decision absent discrimination. The Court of Appeals further ordered the district court to enjoin the employer from future or continued discrimination against Bibbs on the basis of race and instructed the lower court to consider the award of attorney's fees.

Bibbs demonstrates how an employer's liability for impermissible discrimination can be separated from a remedy determination, thus fulfilling title VII's twin objectives of deterrence and redress. Under this framework, proof of bias creates liability and a presumption in favor of relief. It does not automatically compel a specific remedy in an individual instance, but the employer should bear a heavy burden to prove that the applicant or employee who was subjected to a discriminatory practice did not actually suffer as a result.

The U.S. Supreme Court itself applied this framework in *International Brotherhood of Teamsters* v. *United States*,[20] a title VII class action case. The Court there held that title VII was violated once impermissible consideration of sex or race was shown to be a factor in the employment decision,[21] and that proof such a discriminatory motive "changed the position of the employer to that of a proved wrongdoer." [22] Once discrimination is found, an individual class member enjoys a "rebuttable presumption in favor of relief," [23] and the burden shifts to the "employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons." [24] The same sort of analysis should apply to the individual

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However, in a number of cases brought under 42 U.S.C. section 1981, lower courts have distinguished cases involving antidiscrimination statutes from the *Mt. Healthy* situation, citing the dual deterrent and remedial purposes underlying fair employment laws:

"The *Mt. Healthy* 'same decision' analysis rests on the assumption that the only goal is to compensate victims of civil rights violations. . . . The deterrent purposes which also underlie Section 1981 would be thwarted in many cases if an employer were able to avoid liability completely by showing that his intentional racial discrimination happened in this particular instance to be "harmless." The *Mt. Healthy* 'same decision' analysis is quite unlikely to provide the 'spur or catalyst which causes employers . . . to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges' of their racially discriminatory practices." (quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-18 (1975).

Edwards v. *Jewish Hospital of St. Louis*, 855 F.2d 1345, 1351-52 (8th Cir. 1988); *see also Estes v. Dick Smith Ford Inc.*, 856 F.2d 1097, 1102 n.2 (8th Cir. 1988). This is precisely the sort of purpose-based analysis that must be considered when evaluating an employer's liability for impermissible discrimination.

[19] 778 F.2d 1318 (1985).

[20] 431 U.S. 324 (1977); *cf. Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976) (class representative can obtain injunctive relief even if it becomes clear after trial that that particular plaintiff was not the victim of discrimination). This sort of analysis has appeared in U.S. Supreme Court constitutional jurisprudence as well. In *Carey* v. *Piphus*, 435 U.S. 247 (1978), the Court held that a violation of procedural due process may occur even in the absence of actual injury, although the remedy for the violation must be fashioned to avoid a windfall.

"By making the deprivation of [certain absolute] rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury. . . ."

435 U.S. at 266. Society's interest in a workplace free from discrimination similarly dictates for the establishment of such a framework for evaluating liability and remedy.

[21] 431 U.S. at 335 n.15

[22] *Id.* at 360 n.45.

[23] *Id.* at 359 n.45

[24] *Id.* at 362.

plaintiff who demonstrates the presence of an impermissible factor in the decision-making process.[25]

Permitting the employer to present evidence as to what the employment decision would have been (absent consideration of the impermissible motive) during the relief stage, rather than the liability stage, preserves the employer's freedom of choice in specific business decisions without requiring the court to look the other way when presented with proven intentional discrimination. No applicant or employee may expect, nor does title VII require, that an unqualified applicant or inadequate employee be hired or retained in a job as a remedy for an employer's impermissible discriminatory conduct. Instead, relief can be fashioned with consideration for a plaintiff's qualifications while simultaneously recognizing the illegal conduct of the employer.

Rather than order reinstatement, hiring, back pay, or promotion, the court can order declaratory relief, injunctive relief, attorney's fees, changes in the decision-making process, or changes in grievance procedures.[26] For example, injunctive relief, if awarded, can protect the victim from further discrimination.[27] The value to the victim of such non-monetary relief cannot be measured in dollars but rather in psychological satisfaction by recognizing the wrong and indignity of discrimination. Moreover, society as a whole benefits from the elimination of harmful and discriminatory practices in the nation's workplaces.

In recent months, several cases have been decided in the lower courts that demonstrate the state of confusion in mixed-motive litigation created by the *Price Waterhouse* decision. Furthermore, applying the *Price Waterhouse* holding to cases decided prior to the Court's decision demonstrates how the ruling could be used to controvert the purposes underlying title VII, allowing clearly discriminatory conduct to go unremedied. The remaining sections of this memorandum discuss these developments.

III. EXAMPLES OF HOW PRICE WATERHOUSE HAS AFFECTED "MIXED MOTIVES" DISCRIMINATION CASES UNDER TITLE VII

Since the *Price Waterhouse* decision, several courts have been confronted with title VII mixed-motive cases raising the possibility of proven yet unremedied discrimination remaining unsanctioned by the courts.

Nichols v. *Acme Markets, Inc.*[28] illustrates the gaps created in the fair employment laws by the *Price Waterhouse* decision. Plaintiff Nichols, a black woman, was fired by her employer when she punched a customer after the customer used racial slurs against her and slapped her in the face. However, when a white male employee beat a child customer, causing head injuries requiring seven stitches, the company took no immediate disciplinary action. Only after the child's mother complained about the worker's continued employment two weeks later did the company discipline him, and then all it did was to suspend him temporarily. The district court denied the defendant's motion for summary judgment, noting that the record supported an inference that the employer's decision to terminate plaintiff's employment was based on a mixture of legitimate and illegitimate considerations.[29] At trial, however, the defendant employer may avoid all liability by showing that it would have fired the plaintiff even absent impermissible considerations.

Similarly, in *Brown* v. *Amoco Production Co.*,[30] the district court dismissed the plaintiff's title VII race discrimination case upon the presentation of the employer's

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[25] The brief filed by the Department of Justice in *Price Waterhouse* advocates this analysis as well:

"[I]t is proper to place the burden on the defendant to prove that a given employment decision would have been the same in a discrimination-free environment. If the defendant makes such a showing, the plaintiff is made whole by an award of attorney's fees and an injunction against future discrimination. In effect, the defendant is ordered to cease discriminatory activity, which enhances the plaintiff's employment opportunities in the future.

Brief of the United States, No. 87-1167, p.23 (citations omitted).

[26] In a footnote, the plurality opinion in *Price Waterhouse* suggests that it did not address the availability of relief such as that enumerated above because the plaintiff did not request such relief at trial. 109 S.Ct. at 1785 n.5.

[27] Because plaintiffs also often sustain actual and compensable damages, Section 8 of the proposed Civil Rights Act of 1990 would provide for compensatory damages where plaintiffs prove intentional discrimination on the basis of race, sex, national origin, or religion. S. 2104 and H.R. 4000, 101st Cong., 2d Sess. sec. 8 (1990).

[28] 712 F. Supp. 488 (1989).

[29] *Id.* at 493 n.2.

[30] 1989 U.S. Dist. LEXIS 8952 (E.D.La. 1989).

evidence that it would have fired the plaintiff in any case. Mr. Brown, a black male, showed, through statistical evidence, that Amoco employed a disproportionately low number of black employees. In addition, the court found that a co-worker's affidavit and the conduct and testimony of Mr. Brown's supervisor indicated that an impermissible motive may have played a part in the termination decision. In response, the employer presented evidence of Brown's errors in performing his assigned tasks and of his poor relationship with his supervisor. Despite the district court's finding that the supervisor's actions were "clearly suspect," the Court cited *Price Waterhouse* and stated that the employer may avoid liability where the employer shows that the discrimination did not significantly influence the employment decision.[31] Brown's suit was dismissed.

Perry v. *Kunz*[32] provides a final example. Laverne Perry, a 65-year-old black female, alleged that her employer institution, its superintendent, its personnel officer, and two of her supervisors engaged in a campaign to discriminate against her on account of her race, sex, and age, resulting in her termination after twenty years of employment as a food service helper.[33] Ms. Perry had submitted a coworker's affidavit containing statements to the effect that the supervisors commented on Perry's age and that, when they failed to get Perry to resign, they fired her. The district court granted summary judgment to the employer because Ms. Perry did not show that she met the job qualifications in addition to her specific allegations of disparate treatment. The Court of Appeals, however, concluded that the district court had improperly allocated the burdens of proof in this disparate treatment claim. Giving credence to Ms. Perry's allegations of age discrimination, and likewise crediting a finding of the Personnel Advisory Board that Ms. Perry "was incompetent, inadequate, careless or inefficient in the performance of her work and duties," the appellate court cited *Price Waterhouse* in reversing and remanding.

Thus, this case is once again before the district court in the following posture: Ms. Perry can demonstrate that she was terminated, at least in part, because of age discrimination. Despite unrebutted evidence of such discrimination, however, the employer can easily escape liability altogether by presenting evidence that it would have fired Ms. Perry anyway. Ms. Perry has certainly incurred expense, lost time, and lost dignity as a result of the original discrimination; yet she may end up with no vindication for her injury even though she has proved intentional discrimination.

IV. APPLYING PRICE WATERHOUSE TO EARLIER COURT OF APPEALS CASES FURTHER DEMONSTRATES HOW THE COURT'S HOLDING WILL ALLOW IMPERMISSIBLE DISCRIMINATION TO ESCAPE SANCTION.

An examination of cases adjudicated prior to the *Price Waterhouse* opinion further underscores the need to clarify the intent of title VII in light of the U.S. Supreme Court's decision.[34] For example, in *Fields* v. *Clark University*,[35] professor Rona Fields challenged the decision to deny her tenure to the university's sociology department as the product of impermissible sex discrimination. When Ms. Fields rebuffed the sexual advances of a recently tenured professor, she was told "that's no way to get tenure." The male professor then voted against tenure for Ms. Fields, along with five other male department members, all of whom had sexually harassed her and denigrated her professional status. The district court accepted Ms. Fields' strong evidence of the male professors' pervasively sexist attitude to demonstrate that sex was a motivating factor in her tenure denial. Nevertheless, the Court of Appeals reversed the district court's remedy award of reinstatement and back pay, remanding for findings as to whether the university would have granted Ms. Fields tenure absent gender discrimination. If the case had been decided under *Price Waterhouse*, the university would have been insulated from all liability if it succeeded in proving that it would have denied tenure to Ms. Fields for another, legitimate reason. Moreover, if the university had made such a showing, Ms. Fields could have been denied any relief to enjoin further discrimination in future tenure decisions.

In *Nanty* v. *Barrows Co.*,[36] also decided before *Price Waterhouse*, Herbert Nanty, an Apache, was denied employment as a furniture delivery truck driver despite pos-

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[31] *Id.* at 126.

[32] 878 F.2d 1056 (8th Cir. 1989).

[33] Only the ADEA claim was presented to the district court.

[34] This discussion draws heavily from the work of Sarah E. Burns and Alison Wetherfield of the NOW Legal Defense & Education Fund, as appears in Appendix A of their November 5, 1989 memorandum on the *Price Waterhouse* decision. *See also* People for the American Way, *The Overall Impact of the U.S. Supreme Court's 1989 Decisions on Title VII of the 1964 Civil Rights Act* 40–45 (1990).

[35] 817 F.2d 931 (1st Cir. 1987).

[36] 660 F.2d 1327 (9th Cir. 1981).

sessing the advertised requisites—experience in handling and unloading furniture, a class A chauffeur's license, and a good driving record. When Mr. Nanty appeared in person to apply for the job, he was told that the position was filled. He was not interviewed for the job, nor did he receive an application. However, the job had in fact remained unfilled. Three days later, two white men were hired for the job. The Court of Appeals instructed the lower court to enjoin the employer from future or continued discrimination against Mr. Nanty and to award him attorney's fees. It also remanded the case for further consideration as to whether Mr. Nanty was qualified for the job given the employer's subjective criteria of neatness, articulateness, and personableness. Had the case been decided after *Price Waterhouse*, however, the case might well have prevented an entry of injunctive relief and award of attorney's fees to remedy such egregious facial discrimination—if the district court had concluded that the employer had rejected Mr. Nanty's application on the basis of legitimate criteria.

Similarly, in *Ostroff* v. *Employment Exchange*,[37] the Ninth Circuit drew a crucial distinction between the right to protection from discrimination and the right to receive a certain job. When Miriam Ostroff inquired as to the availability of an executive secretary position with a state agency, she was curtly told that the job had been filled. However, when Ms. Ostroff's husband inquired as to the availability of the job shortly afterward, he was told that the position was still available. Although Ms. Ostroff did not possess the requisite qualifications for the job, the lower court held that the false information as to the job's availability was motivated by gender discrimination. The Court of Appeals ruled that an injunction against the defendant's discriminatory conduct should issue regardless of Ms. Ostroff's qualifications. *Price Waterhouse* jeopardizes precisely such prevention of unlawful discrimination.

V. CONCLUSION

If title VII and other fair employment laws are to have any real meaning, then proven victims of discrimination must be able to secure a remedy, while perpetrators of clear discrimination must be held liable for their violations. The *Price Waterhouse* decision imperils this principle. Under this ruling, even Ann Hopkins, who exposed the role of sex-stereotyping in *Price Waterhouse's* partnership decision-making process, may receive no relief when the case is ultimately concluded.[38] The viability of anti-discrimination laws thus depends upon Congressional clarification.

By holding that employers can completely escape liability even where their conduct is clearly in violation of title VII, the Court has provided a way to excuse or condone discrimination. *Price Waterhouse* sends a message that a little overt racism or sexism is okay, as long as it was not the only basis for the employer's action. Without clarification, the result in mixed-motive promotion cases will contradict, and eventually undermine, cases disapproving facial discrimination in hiring. This will only send a message to employers and employees alike that title VII is extremely limited in application, even in cases where there is proof of explicit discrimination. This message clearly subverts title VII's purpose in eliminating impermissible discrimination from the workplace.

Senator SIMON. We are very pleased to have Ms. Greenberger here, managing attorney of the National Women's Law Center, here.

Ms. GREENBERGER. Thank you, Senator Simon. I know the time is short, and so I too will summarize my testimony and ask that it be made part of the record, with the report that we prepared as well on the effect of title VII because of the absence of a damages remedy.

Senator SIMON. It will be.

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[37] 683 F.2d 302 (9th Cir. 1982).

[38] Because it determined that the Court of Appeal had erroneously held the defendant to a "clear and convincing" standard in finding title VII liability, the U.S. Supreme Court ultimately remanded *Price Waterhouse* v. *Hopkins* to the district court. 109 S.Ct. at 1795. These further proceedings will allow *Price Waterhouse* to try to show by a preponderance of the evidence that it would have taken the same action absent its impermissible consideration of gender. If it so proves, Ann Hopkins might well receive no relief whatsoever, despite acceptance by all of the courts of her direct evidence of sex discrimination.

Ms. GREENBERGER. I want to confine my remarks to the importance, my oral remarks, to the importance of adding a damages remedy to title VII.

As you yourself heard and said, we heard very powerful testimony this morning by Patricia Swanson about the injustice that she suffered because of the absence of damages in title VII.

The report that we prepared shows, unfortunately, that Ms. Swanson is not alone. There is case after case after case of egregious fact circumstances, facts as painful as those that Mrs. Swanson suffered, where there was no remedy available because of the absence of damages in title VII.

There is also, Senator Simon, a number of courts who themselves have recognized the injustice of the absence of a damages remedy and said that it was up to Congress to remedy this problem by adding the kind of damages that the Civil Rights Act of 1990 provides.

We heard this morning from Mr. Ayer that somehow or other we shouldn't act precipitously in adding a damages remedy to title VII. He talked about an attitude of "While we're at it," I think were his words, "let's see what else we can do with respect to title VII."

I would submit that that is far from what is at work here. We have had a history of observing in the case of Mrs. Swanson and many others what has happened because of the absence of a damages remedy in title VII. We have seen painful example after painful example.

For this Congress to be reviewing title VII provisions as it is, so important as it is in the Civil Rights Act of 1990, and also looking at the importance of restoring section 1981 to its full scope and effect, to ignore this glaring hole in title VII would be a terrible injustice.

It seemed particularly ironic to me that when Senator Dole introduced the administration's bill, which included a section 1981 change, he described as one of the most important reasons for restoring the coverage of section 1981 that there otherwise would be no damages available to the victims of discrimination under section 1981.

He said, and I quote, "As a result, someone who suffers on-the-job discrimination would be available to avail himself of section 1981's damages provision, a remedy not contained in the other Federal law prohibiting employment discrimination, Title VII of the Civil Rights Act of 1964," as the reason he thought it was so important to change section 1981.

I think we have heard this morning in words far more compelling from Mrs. Swanson than anything I could say why those kinds of remedies are just as important for victims of discrimination not protected by section 1981.

We heard from Eleanor Holmes Norton a description of Helen Brooms's story, and we heard, or this committee heard earlier in its first hearing, about Brenda Patterson's terrible situation which cries out for remedy.

We have seen the spectacle in some of the courts where black women are concerned of trying to figure out in a section 1981 case whether the discrimination they suffer is because of their race or

because of their gender. That is simply an unacceptable status of the law right now.

I want to respond also to a point that was made earlier by the panelists here about deserving victims of discrimination. And what I would submit is that these victims of discrimination are, by their very definition, deserving of full remedies which include compensation for the direct injuries that they suffer as a result of the discrimination and, in those particularly egregious circumstances, punitive damages as well.

I did want to end by including the particular admonition of one of the judges who tried one of these cases. This is a quote that is in page 8 of my testimony, a judge, a trial judge who found his hands tied after hearing a set of very troubling facts. He said:

"There is little incentive for plaintiff to bring a title VII suit when the best she can hope for is an order to her supervisor and to her employer to treat her with the dignity that she deserves and the costs of bringing suit. One can expect that a potential claimant will pause long before enduring the humiliation of making public the indignities she has suffered in private when she is precluded from recovering damages for her perpetrator's behavior. It is, however, the responsibility of Congress rather than this court, to recognize and repair this deficiency in the statute."

And we are here to urge that Congress recognize its responsibility and make those changes as a part of the needed amendments in the Civil Rights Act of 1990.

Thank you.

[The prepared statement of Ms. Greenberger follows:]

PREPARED STATEMENT OF MARCIA GREENBERGER

Good Morning. I am Marcia Greenberger, managing attorney of the National Women's Law Center. I am here to urge strongly your support of S. 2104, the Civil Rights Act of 1990.

This legislation is vitally necessary for two reasons. First, it restores the state of the employment discrimination laws which were eviscerated by recent U.S. Supreme Court decisions. Furthermore, it strengthens such laws to ensure that individuals are free from discrimination in the workplace.

The National Women's Law Center's 17-year history of working to eliminate sex discrimination in the workplace brings me here to attest that we need strong employment discrimination laws as much today as we did when they were originally passed. Sex discrimination remains a serious barrier for women seeking equal opportunity in the workplace. Even the briefest review of the facts supports this contention:

—A study by the National Academy of Sciences attributes a significant percentage of the wage gap between men and women to sex discrimination. At a time when more and more women are entering the ranks of the poor and the "working poor", discrimination has no place in our society or in our economy.

—Women who want to achieve greater economic security by entering traditionally male fields still have made only limited progress. As of 1988, only 9 percent of all working women were employed in what is considered "nontraditional" occupations. This category is a broad one, including such diverse positions as architects, lawyers, auto mechanics, plumbers and truck drivers. One example of enormous difference between male and female representation in certain high-paying fields was presented in the 1987 U.S. Supreme Court case of *Johnson* v. *Transportation Agency of Santa Clara County*, where Ms. Johnson was the only female skilled craft worker out of 238 such workers in the county agency.

—Sexual harassment is a severe problem for a large percentage of women. Since 1980, more than 38,500 sexual harassment cases have been filed with the Equal Employment Opportunity Commission. A 1980 study by the U.S. Merit Systems Protection Board, which was updated in 1988, shows that 42 percent of women

had experienced sexual harassment on the job in the two years prior to the survey. A recent *Working Woman* survey revealed that more than a third of Fortune 500 companies, the corporations that one would expect might be the most enlightened about workplace discrimination, have been sued for sexual harassment, and almost one quarter have been sued repeatedly.

—Sexual stereotyping stands as a very real barrier between women and full opportunities, as many employers still hold set notions about the types of work women can and should do. One recent example is a woman who was demoted by her supervisor who declared that it was "dangerous" for women to get too much education, and scolded her for working when she had two children. *Derr* v. *Gulf Oil Corp.*, 796 F.2d 340 (10th Cir. 1986).

The Civil Rights Act of 1990 contains provisions designed to strengthen existing discrimination law, and to reverse several harmful U.S. Supreme Court decisions. I will briefly outline five of these decisions and their particular impact on women.

Ward's Cove v. *Atonio*, in which the Court substantially increased the burden on plaintiffs proving "disparate impact" discrimination claims. Disparate impact suits have been extremely important to women trying to overcome arbitrary requirements for employment, which while ostensibly neutral on their face, disproportionately exclude women. A classic example is the minimum height and weight requirements for police officers which kept police departments all-male enclaves for many years.

Price Waterhouse v. *Hopkins*, in which the Court stated that some intentional discrimination in employment decisions can be permissible if the adverse employment decision was also based on non-discriminatory grounds. Under this decision, an employer who fires, or fails to hire or promote an employee in part for discriminatory reasons can escape title VII liability entirely if it can show that it would have taken the same action if the discrimination had not been present. Therefore, an employer who has a policy of not promoting women could retain this policy indefinitely so long as it could show that the particular woman challenging the policy did not deserve the promotion. The Act clearly states that employers cannot escape any liability for intentional discrimination simply by showing that they would have made the same decision anyway. Rather, under the bill, while a particular remedy such as promotion may be unavailable if the employment decision would have been made absent the discrimination, remedies to cure the actual discrimination would remain, such as an injunction against the refusal to consider any women for promotion in the future.

Martin v. *Wilks*, where the Court removed the finality and certainty of court-approved consent decrees designed to remedy past discrimination by approving their subjection to endless litigation. Many women, such as those in San Francisco's police department, North Carolina's highway patrol, and virtually all of Memphis Tennessee's city jobs, have benefited and still benefit from such court-approved decrees designed to remedy years of sex discrimination. Without foreclosing the possibility of later appropriate challenges, the Act restores the much-needed general finality of such decrees so that employers will not be subject to ongoing litigation when they seek to rectify past discrimination.

Lorance v. *AT&T*, in which the Court denied a woman her day in court because it determined that she was too late in filing her discrimination claim. Because of its exceedingly narrow reading of the law, the Court declared that Ms. Lorance should have anticipated that she was going to be demoted for discriminatory reasons three years before the event took place and filed her challenge at that time. The Act remedies this narrow reading of the law by stating that people can file claims up to two years after they have been affected by the discrimination, with a precise application of this principle to collectively-bargained seniority systems.

Patterson v. *McLean Credit Union*, where the Court denied a woman the right to sue her employer for racial harassment under § 1981, ruling that racial discrimination which takes place any time after an employee is hired is not unlawful under this statute. The restoration of the integrity of § 1981 is particularly needed by women of color, who suffer from the "double jeopardy" of race and sex discrimination. The Act makes clear that all forms of racial discrimination in employment are unlawful under this statute.

While overturning the adverse effects of prior U.S. Supreme Court cases is a major purpose of this legislation which the National Women's Law Center strongly supports, I have been asked to focus my testimony on the second important purpose of the Civil Rights Act of 1990: to correct anomalies in the law which have been demonstrated to severely weaken title VII's effectiveness. It is this aspect of the legislation, in particular the damages provision of the proposed legislation, that I will address in more detail now.

The Civil Rights Act of 1990 would allow victims of intentional discrimination to seek damages under title VII, as those suffering racial discrimination may under § 1981. I want to make very clear that, as is true under § 1981, under the bill the damages remedy is only available to victims of *intentional* discrimination. Some have claimed the bill would apply a damages remedy to disparate impact cases. However, Section 8 of the proposed legislation expressly provides that disparate impact cases are not subject to damages.

Currently, title VII does not allow any discrimination victims to seek any damages. A successful title VII plaintiff is limited to the following relief: injunctions against future discriminatory behavior, reinstatement to the job if he or she was wrongfully fired, not promoted, or not hired in the first place, and/or no more than two years of back pay if the victim can prove that he or she lost wages as a result of the discrimination.

The remedies currently available under title VII can prove woefully inadequate to many victims of discrimination. The National Women's Law Center's report entitled "Title VII'S Failed Promise: The Impact of the Lack of a Damages Remedy" extensively chronicles case after case in which courts have found in reported decisions that individuals have been discriminated against by their employers, and yet the victims have gotten minimal or no relief under title VII. A copy of this report is attached to my testimony, and I ask that it be included in the record. The lack of a damages remedy means that discrimination victims cannot recover for medical bills, emotional trauma, and lost opportunities, even if they are directly caused by the discrimination.

I will summarize briefly here only a few of the examples described in more detail in our report. One victim of title VII'S failed promise is Helen Brooms, a nurse who was severely sexually harassed by her supervisor, who showed her pornographic pictures and informed her that she was hired to perform the acts depicted. When she complained to her supervisor's superior about the harassment, the superior, rather than halting the harassment, compounded the problem by making further insulting and highly inappropriate comments to Ms. Brooms. Finally, Ms. Brooms' supervisor grabbed her and threatened to kill her; she was physically inured when she fell down a flight of stairs escaping him. Consequently, Ms. Brooms suffered serious emotional and medical problems, requiring extensive medical treatment. Although the court found that her employer had violated title VII by these actions, she recovered no compensation for her medical injuries or her distress. *Brooms* v. *Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989).

The case of Helen Brooms is not an isolated one; similar cases are reported all over the country involving a wide range of discriminatory behavior. For example, Gail Derr was demoted from her job as a lease analyst by her supervisor, who told her that she had no business pursuing a career when she was the mother of two. She recovered nothing in her title VII suit, despite a finding by the court that she had been discriminated against. *Derr* v. *Gulf Oil Corp.*, 796 F. 2d 340 (10th Cir. 1986). Rodney Compston, a millwright, got along well with his supervisor until his supervisor learned he was of Jewish descent. Thereafter, the supervisor became hostile and repeatedly hurled religious epithets at him. Even though the court found that Mr. Compston had been discriminated against, and that he had suffered mental anguish and humiliation as a result of the discrimination, Mr. Compston recovered only the nominal sum of $50 because damages were not available under title VII. *Compston* v. *Borden, Inc.* 424 F. Supp. 157 (S.D. Ohio 1976). Curtis Cowan was passed up for promotion to manager three times because he was black. However, he recovered nothing under title VII because the court determined he would not have earned more as a manager during the relevant time period. Had § 1981 not been available, his humiliation, distress, and unrealized higher future earnings would have gone unredressed. *Cowan* v. *Prudential Ins. Co. of America*, 852 F.2d 688 (2d Cir. 1988).

The effect of a lack of a damages remedy extends far beyond the reported case law. For every reported case in which a discrimination victim received no compensation for her injuries, there are many more that never reached the courtroom because no meaningful relief was available even if the victim did prove discrimination. As the court observed in *Mitchell* v. *OsAir, Inc.*, 629 F. Supp. 636 (N.D. Ohio, 1986):

> There is little incentive for a plaintiff to bring a title VII suit when the best she can hope for is an order to her supervisor and to her employer to treat her with the dignity she deserves and the costs of bringing her suit. One can expect that a potential claimant will pause long before enduring the humiliation of making public the indignities she has suffered in private . . . when she is precluded from recovering damages for her perpetrators' behavior. It is, however, the re-

sponsibility of Congress, rather than this Court, to recognize and repair this deficiency in the statute.

Id. at 643.

In that case, the court was unable to grant any relief at all to a woman who had conclusively proven sexual harassment because title VII did not allow an award of damages. Not only does the lack of a damages remedy deter bona fide discrimination victims from vindicating their rights, it fails to provide employers with a meaningful incentive to comply with the law. The U.S. Supreme Court stated in *Albemarle Paper Co.* v. *Moody*, 425 U.S. 405, 418 (1975) that title VII's remedies are intended to advance the dual statutory goals of 1) eliminating effects of past discrimination and 2) preventing future discrimination. As my previous testimony has shown, because of the absence of a damages remedy, the first goal is all too often not attained. Furthermore, the latter goal of deterring future discrimination by employers is often unmet as well. Employers can condone or perpetrate discrimination knowing that, even if they are found guilty of discrimination, the price tag on such unlawful practices is very small indeed. Let us suppose that an employer intentionally pays a female employee less than her male counterparts, and for several years denies her promotions that she deserves simply because she is a woman. If she sues under title VII and wins, the most that the employer will have to pay her is the difference between her actual wages and what she would have made if no discrimination had taken place. The woman is entirely uncompensated for the years of humiliation, stress, and career losses she suffered from being underpaid and denied promotions that she deserved. Further, as for the employer in this example who practiced longstanding intentional discrimination, because it was discrimination based on gender and therefore not covered under § 1981, the employer would escape liability for much of the injury it caused, and thereby be provided with little incentive to root out and eliminate discriminatory practices in the future.

The damages remedy provided in the Civil Rights Act, because it is modeled precisely after the remedies available under § 1981, is both reasonable and effective. The inclusion of a damages remedy in title VII ensures that victims of all types of prohibited discrimination receive adequate relief for the harm they have suffered.

Under the bill, as is the case in § 1981, two types of damages are available. First, compensatory damages are available to provide a victim of intentional discrimination with compensation for the injuries suffered because of the discrimination. Elements such as medical bills, lost career opportunities and emotional distress are included. Further, the proposed legislation provides that punitive damages may be assessed in particularly egregious discrimination cases. Where defendants have acted with malice, or with callous indifference to the right of individuals to be free from discrimination in the workplace, punitive damages may be imposed. The punitive standard in the proposed legislation is drawn directly from the standard applicable in § 1981. *See Smith* v. *Wade*, 461 U.S. 30, 56 (1983); *Block* v. *R.H. Macy*, 712 F.2d 1241, 1246 (8th Cir. 1983); *Stallworth* v. *Shuler*, 777 F.2d 1431, 1435 (11th Cir. 1985); *Yarbrough* v. *Tower Oldsmobile, Inc.*, 789 F.2d 508, 514 (7th Cir. 1986).

Finally, even though I have emphasized that the title VII damages remedy mirrors that provided in § 1981, there are two important respects in which the title VII remedy is more limited. First, § 1981 applies to all employers, while title VII applies only to those employers with fifteen or more employees. It has been estimated that over 11 million workers in over four million firms are not covered by title VII, and therefore will not have a title VII damages remedy. Second, title VII brings with it a conciliation process not available under § 1981 which would apply to any title VII damages claim.

Damages are a reasonable and long-overdue remedy for victims of intentional employment discrimination who have suffered serious harm as a direct result of the discrimination. Furthermore, the addition of damages to title VII ensures that all victims of unlawful discrimination have comparable remedies available to them, sending a strong message to the nation that all forms of discrimination are intolerable in our society.

The evidence is clear. Sex discrimination, like other forms of discrimination, is a serious problem in our society, and the Civil Rights Act of 1990 is a vitally important tool for eradicating such discrimination. I urge you to pass the Act promptly. Thank you.

The report entitled "Title VII's Failed Promise: The Impact of the Lack of a Damages Remedy" is retained in the files of the Committee. It may be obtained from: National Women's Law Center, 1616 P Street, N.W., Suite 100, Washington, DC 20036.

Senator SIMON. I thank you.

Mr. Maddux, you are, as I recall, the attorney for or you represent the California Retail Federation; is that correct?

Mr. MADDUX. We represent them here on behalf of the National Retail Association.

Senator SIMON. The national.

Mr. MADDUX. Yes.

Senator SIMON. OK. But speaking either for the California or the national association, did the *Griggs* decision cause any unfair burden to any of your retailers? Have you ever heard retailers complain about the *Griggs* decision?

Mr. MADDUX. In all candor, I know of no client of mine who has ever had a problem with the *Griggs* decision.

Senator SIMON. I assume from your testimony, which is well documented, that you read the *Wards Cove* decision.

Mr. MADDUX. Yes, I surely did.

Senator SIMON. The *Wards Cove* decision clearly shifts the burden to the plaintiff in this kind of a situation. And as Secretary Coleman, who was appointed by President Reagan, testified here the other day, said, it makes it substantially more difficult for anyone to prove discrimination.

But you feel that the *Wards Cove* decision was proper and we shouldn't do anything to address the *Wards Cove* decision?

Mr. MADDUX. I think the *Wards Cove* decision was very correctly decided. I have always had a difficult time understanding why it would be that where you have a case of intentional discrimination the burden on the employer under *McDonnell Douglas* and the other cases of simply articulating a legitimate non-discriminatory reason for its decision should be a less burden than a burden under a disparate impact kind of case where you place, under the proposed legislation, a greater burden on the employer.

So I have no difficulty with O'Connor's views in the *Watson* v. *Ft. Worth Bank* case, which really, in effect, go forward in *Wards Cove*, of there being a burden on the plaintiff ultimately to persuade the trier of fact that discrimination has taken place.

I also have no difficulty with the concept in *Wards Cove* that you have to identify what you have been doing wrong in order to be able to defend yourself against a claim that you've done something wrong. That seems to be a very important part of the *Wards Cove* decision.

Senator SIMON. The Alaska Cannery clearly was discriminating in its housing pattern, in its what they call the mess hall, their eating pattern. The use of statistical evidence, you don't believe, should be available to a plaintiff?

Mr. MADDUX. I certainly believe that the use of statistical evidence should be available to a plaintiff. It was available to the plaintiffs in that case, and that decision very properly applied which statistical measure should have been used—that is, a qualified applicant pool matched up with the jobs in issue.

With respect to the segregated housing facilities that took place in that case, of course, I respectfully remind the Senator that that case did not find any disparate treatment intentional discrimination. There was never in that case at any level a finding that there had been intentional disparate treatment discrimination against any of the parties in that case.

Ms. GREENBERGER. Senator.

Senator SIMON. Yes.

I would differ with your conclusion there. But we are going to have to move along. If you have something urgent, then I have one other question I want to ask the two of you.

Ms. GREENBERGER. I just wanted to say that I disagree that this bill puts a higher burden on employers for disparate treatment cases than it does for disparate impact cases. I think that that is absolutely false. I think that the plaintiff has a burden in each of those kinds of discrimination cases to prove the discrimination that is at issue, and that burden remains with the plaintiff with the Civil Rights Act of 199.

It is in the context of the disparate impact case, once that disparate impact is proven by the plaintiff and that plaintiff retains that burden, then the employer should, and properly does under this legislation, have the burden of coming forward to prove an affirmative defense of business necessity. And that is the way the law was before *Wards Cove*, and it doesn't place a higher burden on employers than they had.

Senator SIMON. If I may ask one final question of Ms. Lichtman and Ms. Greenberger. Mr. Lorber in his testimony says, "The apparent rush to pass a bill with a minimum of debate and consideration is an unseemly and inappropriate way of treating civil rights." Any reaction?

Ms. LICHTMAN. I do have a reaction. I don't think anybody could have sat here just in these 2 days of hearings and heard Brenda Patterson or heard this wonderful testimony this morning and talk about a rush to do anything or that somehow what you are doing is unseemly.

It seems to me that, if anything, remedying discrimination and bringing the full force and effect in the 1990's almost in the year 2000 for title VII to be truly effective is no rush, since 1964.

Ms. GREENBERGER. If I might add?

Senator SIMON. Ms. Greenberger.

Ms. GREENBERGER. Senator Simon, unfortunately because of illness, Nancy Creiter from Women Employed was not able to come today, but I do also have a copy of her testimony. And as Ms. Lichtman said, we heard from—and as you pointed out, very courageous witnesses who went to court in the face of all of the hurdles and difficulties that that entails to try to secure justice.

Women Employed's experience, and as it was stated in their testimony actually from your State of Illinois, that 80 percent of the women they counsel who face discrimination do not go to court because of these hurdles and because of the absence of damages.

To the extent that we are at this moment not remedying—and I should say, not only don't go to court but don't file charges with the EEOC either because they are not able to get compensation for the damages that they suffer—the time has long passed when we should have corrected this problem. We are hardly rushing now.

Senator SIMON. Thank you all for your testimony. The hearing stands adjourned.

[Whereupon, at 12:39 p.m., the committee was adjourned.]

CIVIL RIGHTS ACT OF 1990

THURSDAY, MARCH 1, 1990

U.S. SENATE,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC.

The committee met, pursuant to notice, at 9:05 a.m., in room SD-430, Dirksen Senate Office Building, Senator Howard M. Metzenbaum, presiding.

Present: Senators Kennedy, Metzenbaum, Simon, Hatch, Kassebaum, Jeffords, and Coats.

OPENING STATEMENT OF SENATOR METZENBAUM

Senator METZENBAUM [presiding.] Good morning.

Today we will conduct the third of four scheduled hearings on the Civil Rights Act of 1990. This hearing will focus on sections 3 and 4 of the bill. Those sections are intended to overrule the Supreme Court's recent decision in *Wards Cove* v. *Atonio* and to reinstate the U.S. Supreme Court's unanimous 1971 decision in *Griggs* v. *Duke Power*.

In 1964, Congress enacted title VII to prohibit discrimination in the workplace based on race, color, religion, sex, or national origin. It was a sweeping change designed to prohibit not only blatant acts of ill will but also subtle institutional bias.

In 1971, Chief Justice Burger, for the unanimous U.S. Supreme Court in *Griggs*, recognized that title VII requires the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

Some 18 years later, the new U.S. Supreme Court majority, in *Wards Cove*, held that such discriminatory barriers may remain in place.

Worse, the new majority, led by three Reagan appointees, sent a clear signal that new barriers may be erected with impunity.

The Civil Rights Act of 1990 sends a completely different signal. The bill stands for the simple proposition that all barriers to equal employment opportunity, whether intentional or not, must come down.

I was encouraged by last week's initial hearing on this bill. A distinguished bipartisan panel of former cabinet secretaries testified about the critical need for this legislation. I believe their most important message was that we must enact this legislation to change the moral climate of this Nation.

Over the last 9 years we have seen a marked increase in the tolerance for racism and sexism. The Reagan administration launched a campaign against civil rights. Ronald Reagan did more to set back the clock on civil rights than any President in this century. His administration consistently turned a deaf ear to the complaints of the victims of discrimination. The result was an increase in the number of hate crimes, increased discrimination, and increased frustration by women and minorities who are striving for their piece of the American dream.

It is no wonder, then, that the U.S. Supreme Court, with the three Reagan appointees tipping the balance, slammed the door in the face of the victims of discrimination.

But enactment of this legislation would help change all that. It will send a message that will resound around the world, from salmon canneries in Alaska to power companies in North Carolina, from gold mines in South Africa to shipyards in Poland, that America stands for equal employment opportunity for all its people.

I look forward to the testimony from today's witnesses. We have four outstanding panels that should provide us with valuable personal, legal, and business insights on the operation of title VII and the need for sections 3 and 4 of this bill.

Senator Hatch.

Opening Statement of Senator Hatch

Senator HATCH. Thank you, Mr. Chairman.

I am happy to welcome you all here today, especially our witnesses. We look forward to hearing from you on both sides of this issue and trying to make the best possible decisions we can in the Senate.

Today we consider the *Wards Cove* v. *Atonio* decision. By overturning the *Wards Cove* v. *Atonio* decision and jimmying the rules of proving a case of disparate impact discrimination, S. 2104, in our opinion, would work a radical transformation of title VII. It would convert title VII from a statute focusing on equal opportunity for individuals to one presumptively requiring, indeed virtually compelling, quota-type hiring and promotion for groups.

Now, how is that so? Under sections 3 and 4 of S. 2104, all a plaintiff needs to do to win a title VII case or lawsuit is to show that an employer has a racial, ethnic, or gender imbalance in a job, without identifying any particular employment practice as having caused that particular disparity or imbalance, period. That is all he has to do.

If there is any showing of a racial, an ethnic, or gender imbalance in a job without, as they have always had to do in the past, identifying a particular imbalance or a particular employment practice as having caused the imbalance, then they win, regardless of whether there was any discrimination or not.

For example, suppose that 20 percent of the accountants in a labor market are members of a particular racial or ethnic group. Suppose further that only 10 percent of the accountants in an accounting firm in that labor market are from that group. That business is going to be found guilty of racial discrimination unless the

business can not only prove its innocence but do so under virtually an impossible standard. Those who try these cases, I think, have to acknowledge that that standard will be virtually impossible to prove for the employer.

An employer could only avoid liability if he meets the burden of persuasion that all of his or her job criteria either did not contribute to the imbalance or are essential to effective job performance.

That word "essential" is an impossible burden in the eyes of most legal authorities. This burden, as I have said, would be virtually impossible to meet and one which finds no precedent whatsoever in U.S. Supreme Court decisions.

In order to avoid liability under this extraordinary burden, employers would have to hire and promote on a quota basis to avoid these disparate impact suits or they would find themselves in litigation all the time, which is very expensive; to avoid, in short, what Justice O'Connor called "expensive litigation and potentially catastrophic liability."

Now, this precise concern was also expressed by Justices White and O'Connor and others in several cases, including *Wards Cove* v. *Atonio* and *Watson* v. *Ft. Worth Bank and Trust.*

In short, rather than requiring nondiscrimination and equal opportunity, title VII's touchstone would become proportional representation and equal results on the basis of race, ethnicity, and gender—in other words, quotas, however surreptitiously adopted or euphemistically described.

I believe the administration is dedicated to preventing this terrible result, and I join them in that resolve. Attorney General Thornburgh, a constant friend of civil rights, constant friend of minorities in this country—I don't think anybody could doubt that—said on February 7, 1990, the administration's firm commitment to eliminate employment discrimination also means that we continue to oppose racial quotas. Discrimination is wrong no matter at whom it is directed. The administration therefore, opposed any legislation aimed at overturning three U.S. Supreme Court decisions, including *Wards Cove Packing Co.* v. *Atonio.*

The attorney general described this decision and two others, including *Martin* v. *Wilks*, as "decisions rooted in the court's opposition to racial quotas, which we share. We urge the court to reach the decisions it did in each of these cases. We agree with them and will oppose any legislation that seeks to overturn them."

As Stuart Taylor, Jr. observed in a recent issue of *Legal Times*, he said, "Under this bill, the beneficiaries of disparate impact suits would not necessarily be victims of discrimination and the defendants would not necessarily be guilty of anything but hiring and promoting the people they consider the best qualified."

Now, no one should be fooled by irrelevant language in the bill intended to camouflage its import. Sections 3 and 4 are the operative provisions of the bill. Those sections overturn *Wards Cove* by stacking the rules of proving a disparate impact against employers in the manner I mentioned earlier.

The concern in this bill is not about court-ordered remedies or conciliation agreements. It is the radical revision and the standard of disparate impact liability and misuse of statistics that create the severe quota threat of S. 2104.

The bill's denial that it addresses affirmative action, which is not defined in any event, is irrelevant. The operative language of sections 3 and 4 create the problems that I have described.

I might also add that *Wards Cove* is fully consistent with the *Griggs* v. *Duke Power Co.* decision, and *Griggs* remains good law today.

Moreover, whether or not *Griggs* has led employers in the past to use quotas is totally irrelevant to this bill. This bill does not codify *Griggs*. It twists *Griggs* completely out of shape. It is S. 2104 and how it distorts *Griggs* is the source of my present concern and, I think, those who are students of this matter.

I look forward to hearing the witnesses today and hearing them on these key issues because this is important stuff. I happen to believe that except in those limited instances where the courts do allow reverse discrimination, where the U.S. Supreme Court has permitted it, and it is extremely limited, that we should not be going toward that type of a system at this particular point in our system of American jurisprudence. Nor should we go to a system that makes it more difficult to conciliate, more difficult to settle these matters, more difficult to get people back to work. Nor should we go to a system that leads to more litigation and more use of litigation and more combative confrontations between employers and employees.

We ought to be working toward resolving these issues of discrimination in the most effective and reasonable ways so that we can bring our society as far as all of us would like to bring it, to a society that really does not discriminate.

I suppose that it is fair to say that there are always two sides to these issues, and I am going to keep an open mind to see if there is some way that we might be able to put together a Civil Rights Act of 1990 that will indeed progressively help us to continue this upward march to try to resolve conflicts and problems that really do exist in our society. And to that degree, I want to compliment and befriend and express appreciation of my colleagues who are so helpfully in support of this bill.

Thank you.

Senator METZENBAUM. Thank you, Senator Hatch.

Senator Kennedy.

OPENING STATEMENT OF SENATOR KENNEDY

The CHAIRMAN. Thank you very much, Mr. Chairman.

First of all I want to commend you for the work that you have done in helping to shape the Civil Rights Act of 1990, especially with respect to the *Wards Cove* decision, the introduction of your own legislation to deal with that unfortunate conclusion of the U.S. Supreme Court. It is entirely fitting that you chair these hearings this morning.

Despite continuing efforts by opponents of this legislation to mischaracterize what we are doing, our intention is clear: We seek only to restore the law that had been in effect prior to the U.S. Supreme Court's decision in the *Wards Cove* case, the law stated in the court's unanimous decision in *Griggs* v. *Duke Power* in 1971.

In hundreds of cases over the past two decades, the *Griggs* rule was used to strike down subtle and not-so-subtle practices that kept minorities and women from participating fully and fairly in our economy. Under *Griggs*, once a plaintiff demonstrates that an employment practice has a disparate impact on women or minorities, the employer bears the burden of proving that the practice is required by "business necessity." As the U.S. Supreme Court stated in *Griggs*, "the touchstone is business necessity,"—and business necessity is the touchstone of our bill.

In defining business necessity, our bill uses the words "essential to effective job performance". Those words are taken from the U.S. Supreme Court's opinion in the *Dothard* v. *Rawlinson* case of 1977. That language has been applied by lower courts over the past 13 years. It has not led to quotas of any kind, and it will not lead to quotas in the future if the law is restored.

Those who see quotas in this legislation are resorting to scare tactics. They are ignoring the long and satisfactory experience in hundreds of cases decided under the *Griggs* rule and its touchstone of business necessity.

Victims of job discrimination are entitled to the full protection of the law, and they will receive the justice they deserve under the legislation that we have introduced.

There are many distinguished witnesses today. I am thankful for their presence and look forward to their testimony.

Thank you very much, Mr. Chairman.

Senator METZENBAUM. Thank you very much, Senator Kennedy.

Senator Coats.

Senator COATS. I have no statement, Mr. Chairman.

Senator METZENBAUM. Thank you very much.

We would ask our first panel to come to the table. It is comprised of two workers who, prior to *Wards Cove*, successfully eliminated arbitrary employment barriers that would have barred them from their chosen careers. Ann Brunet from Bexley, OH, has been a member of the Columbus Fire Department for over 2 years. Robert Lum is a sergeant with the New York City Police Department. He is a 15-year veteran of the force.

We are very happy to hear from you. Ms. Brunet, please proceed.

STATEMENTS OF ANN M. BRUNET, BEXLEY, OH; AND ROBERT LUM, LONG ISLAND CITY, NY

Ms. BRUNET. Thank you very much, Senator.

My name is Ann Brunet. As you stated, I am a firefighter in Columbus, OH. I am here to tell you about myself and a class-action case which allowed me to become a firefighter. As of this date, I have been on the fire department for about 2½ years, and I find that I like my job very well. It allows me to fight fires in residential houses, warehouses, and lumber yards, just to name a few.

It also allows me the chance to take advanced medical training which enables me to work on squads and medics, all of which I hope will help me to be a better firefighter. I feel a sense of great pride in being able to serve the community in this necessary function.

Why did I want to become a firefighter is a question that has been asked of me many times. In answer to this question, I would like to say that the job fits my personality. It provides me with the stability and challenge that I think I have always been looking for in a job.

How I came upon it is a different story. While working at my previous job, I met several firefighters, and through them I became very interested in the job. Those individuals felt that I could do the job, and so did I. Also, my grandfather was a firefighter in Somerville, MA, and my uncle was a firefighter in Lowell, MA. So, you see, fire fighting runs in the family, and I felt challenged by this as well.

So in 1984 I took the test for a Columbus firefighter. After I took the test, I also started taking classes in fire science at a local college to better prepare me for the job. Upon completion of both the written and physical tests, I was filled with great expectations because I felt I had scored well.

A letter arrived for me in 1984 which told me I would not be hired. And also, because I felt I had done well, I felt that there was a problem. I went to review the scores of everyone and discovered not one female ranked high enough to be hired.

To me this indicated that here we had a situation which was more than just discrimination. I believe women in general were being removed from the hiring process. Now I felt depressed, angered, and discriminated against. I felt I had to do something because I felt a wrong was being committed here, and I was going to correct it.

These feelings forced me to seek out an attorney, and after a somewhat time-consuming search, I found a law firm willing to take the case. We filed a lawsuit at the end of 1984, and the case went to trial in 1986. During this trial, there was a week-long debate with lawyers and expert witnesses explaining in facts and numbers what I felt in my mind and heart was the reason for me bringing the case against the City of Columbus.

At the trial there was a lot of talk about the events on the physical agility test. Since I have been on the department, I have learned that these events aren't really related to the job.

For example, the task of picking up a 125-pound sandbag dummy and carrying it through an obstacle course is not at all close to the methods taught in the fire academy. In the fire academy you are taught to drag a person and use your agility along with your strength to move the person. In the 1984 test, they chose to focus on just the upper-body strength instead of other traits you use in a real fire department.

Another event required of me was to hoist a 2½-foot hose up the side of a building via a hose roller. If you were to question firefighters concerning this, they would easily say that the task may be done once in a lifetime and that was usually when they were at the training academy.

The third event required of me was to run up and down six flights of stairs with 47 pounds of equipment as fast as possible. Just like the dummy carry, the method taught in the academy is much different than what we were required to do. Standard operating procedures for a high-rise is to take the elevators to the floors

below the fire floor and then advance up the stairways. If no elevators are available, equipment may be shuttled up the flights in relays. We are taught to use a steady pace and not to run because running is dangerous.

Eventually I was hired in 1987. My job was not given to me, only the opportunity to pursue the challenge. Federal Judge Kinneary understood when he ruled in my favor that I was qualified. The judge ruled in my favor because the facts showed that if women are given an equal opportunity, they can do the job just as well.

I had to work out and train to be able to pass the physical part of the test. No one did the work for me. What was given to me were good lawyers to prove my case.

Today I find myself wondering whether this case may have been decided differently because of recent decisions made by the U.S. Supreme Court. Would I and other women have been hired, or would we still be working minimum-wage jobs like I did?

I must also say I would have been deterred from my goal, even though I felt so strongly about it, because it would have been more difficult to win a case.

The chance to become one of Columbus' finest is a great feeling, and I hope others will continue to have the same opportunity that I had. After all, we say in America you have the right to be what you want to be, to live where you want to live, to work the job that you want to work at. Our Government is supposed to say to us, the citizens, if you are not getting a fair deal, we are going to step in and help you.

For me this is easy to say, but when you are from a family of 12, fatherless, and with little money, help sometimes seems beyond reach. I thank God for my family and friends and my lawyers for their help and their belief in me obtaining my goal to be a firefighter. I thank you today for listening to me.

Senator METZENBAUM. Thank you very much, Ms. Brunet. And I want to say how proud I am as your Senator you are my constituent. And I think you used awfully good judgment in an earlier point in your life also when you moved from Massachusetts to Ohio. [Laughter.]

The CHAIRMAN. Twelve members in the family? [Laughter.]

Senator THURMOND. Mr. Chairman, if she is through with her statement?

Senator METZENBAUM. She is through with her statement.

Senator *Thurmond.* I have three committees going on. Could I take about 2 minutes and make this statement?

Senator METZENBAUM. Absolutely. Please do. Please proceed.

OPENING STATEMENT OF SENATOR THURMOND

Senator THURMOND. Mr. Chairman, I would like to commend you for holding this third in a series of hearings on recent U.S. Supreme Court decisions relating to discrimination. Today we will examine the decision in *Wards Cove Packing Co.* v. *Atonio,* which is addressed in section 4 of S. 2104.

In an article appearing in the *Wall Street Journal* on June 30, 1989, Judge Robert H. Bork analyzed this decision with his usual keen legal insightfulness. I have found his analysis to be especially

cogent and would like to share just excerpts with the members of this committee.

Mr. Chairman, 18 years prior to the *Wards Cove* case, the U.S. Supreme Court decided in *Griggs* v. *Duke Power Company* that title VII of the Civil Rights Act of 1964 did not require a plaintiff to prove intentional discrimination. According to this line of reasoning, Judge Bork observes that "statistical imbalance in the racial composition of the workforce was presumed discriminatory unless proven otherwise. The test was the consequences of business practices, not their motivation.

"This highly questionable reading of the act produced unfortunate results. Statistical imbalances are everywhere in our society, since entirely innocent social forces and cultural differences do not produce proportional representation of each ethnic group and each occupation.

"*Wards Cove* involved Alaskan salmon canners who had a predominantly white workforce in skilled jobs and a predominantly nonwhite workforce in unskilled jobs. The court of appeals has held that imbalance creates a prima facie case against the companies. Justice White's opinion for the majority disagreed. The lower court's theory that 'at the very least, would mean that any employer who had a segment of his workforce that was—for some reason—racially imbalanced could be hailed into court and forced to engage in the expensive and time-consuming task of defending the "business necessity" of the methods used to select the other members of his workforce.' Thus, 'the only practical option for many employers would be to adopt racial quotas; this is the result that Congress expressly rejected in drafting title VII.'

"The court held that the proper comparison was between the proportion of a racial group in the workforce and the proportion of qualified members of that race in the pool available to the employer. The plaintiff must also identify the employment practice alleged to be responsible for the disparity. Once this has been done, the employer must produce evidence of business justification for those practices, but the ultimate burden of persuading the court that discrimination exists with the plaintiff."

Judge Bork further states, "Civil rights activists charge that the court had done two terrible things. One was to change the rule of *Griggs*; the other was to make it more difficult to win a discrimination case. Neither charge has any merit. Courts modify prior decisions all of the time. The fact that plaintiffs may have more difficulty winning proves nothing at all. The object of the law was not to see that the plaintiffs always win. All that the U.S. Supreme Court has held is that discrimination must be proved rather than assumed."

Former Solicitor General of the United States Charles Fried, in testimony before this committee last week observed that section 4 of S. 2104 "threatens great harm." I agree.

Mr. Chairman, my schedule will not permit me to remain for the entire hearing. As I have stated, I have got some other committees I have got to go to, but I thank you very much for your courtesy.

Senator METZENBAUM. Thank you very much, Senator Thurmond.

Senator Simon, since we have heard an opening statement from Senator Thurmond, if you have an opening statement, we would be happy to hear from you at this point.

Senator SIMON. I have no formal opening statement, and I regret that I have another hearing ~~that I~~ am going to have to leave for very shortly.

I think of all the decisions, the one that has the greatest long-term impact is this *Alaska Cannery* decision, where there really is a shift of the burden of proof to the plaintiff and where, whether it is the Columbus Fire Department or New York City Police Department or what the entity is, it just is a substantial reversal of that earlier decision.

I think it is most unfortunate, and I think it is going to have long-term, very adverse effects, and I hope we will move very quickly on this legislation to reverse this situation.

Senator METZENBAUM. Thank you, Senator Simon. You have certainly been involved in this entire matter, and we very much appreciate your continuing support and efforts in this direction.

I think before we have any questions for Ms. Brunet, we will hear from Mr. Robert Lum, New York City Police Department.

Mr. Lum.

Mr. LUM. Good morning, Mr. Chairman, distinguished committee members. As Senator Metzenbaum stated, my name is Robert Lum, and I am presently a sergeant in the New York City Police Department.

This morning I would like to tell you about the obstacles I have had to overcome in order to be employed by New York City. I will also tell you some of my accomplishments and how I would not be speaking to you today if it weren't for the title VII of the Civil Rights Act of 1964.

To begin with, in 1969 I entered college with the intention of becoming a teacher. However, during my junior year I began to lose interest in that field. I began talking to family and friends in an effort to decide on the field I thought I would like to work in.

One of my friends told me that there was a civil service exam for the position of New York City Housing Authority police officer, scheduled for January 1973, and suggested that I take it. In fact, in January of 1973 I did just that.

My score on this test was 82.5, and I was assigned a list number of 731 out of a list of approximately 2,000 candidates.

In April of 1973 I was called to take the physical part of the exam. For your information, one has to have passed four parts in order to be certified as a New York City police officer.

Senator METZENBAUM. He has to be tested what?

Mr. LUM. They have to have passed four parts in order to become a New York City police officer.

Senator METZENBAUM. Thank you.

Mr. LUM. Namely, the written, the physical, the medical, and the character investigation.

I had successfully passed all phases of the physical with the exception of one: The height requirements. Apparently, one of the prerequisites for this exam was that the candidate had to be 5'7". During the physical part of this exam I found out I was 5'6½" and thus disqualifying me for the position.

That really irked me for three reasons: One, having studied Karate and Kung Fu for more than 6 years prior to taking this exam, I felt that I was in good physical condition and sufficiently skilled in self-defense to handle myself in the performance of police duties.

Two, the position only required a high school diploma. I was well on the way to obtaining a bachelors degree.

And third, no reason was ever told to me why one had to be 5'7" to be a police officer.

Immediately upon being notified that I was disqualified, I filed charges alleging discrimination, on the basis of race and/or national origin, with both the Federal and the State Equal Employment Opportunity Commissions.

My contentions were that the 5'7" minimum was an arbitrary standard, that it was unrelated to the performance of police duties, and it unlawfully discriminated against Asians, females, and other groups.

During May of 1973 I graduated college with a bachelor's degree in education. Still determined not to enter the teaching profession, I took a job with a utility company with a starting salary of $7,500.

In April of 1974 I finally filed my court case alleging discrimination under title VII of the Civil Rights Act of 1964. In July of 1974, as a result of my case, New York City agreed to waive the height requirement and administer the medical and the character investigation. If I was found qualified, New York City would then certify me as a police officer.

Ultimately, the State of New York consented to the removal of the height requirements for all future law enforcement exams.

On September 17, 1974, I was finally sworn in as a New York City police officer. The starting salary then was $11,944. That was $4,000 more than I was making at the utility company at the time. And that is how I came to be employed by New York City as a police officer.

Now I would like to tell you about some of the assignments I have had since joining the New York City Police Department. Initially, I started my career performing patrol duties, as most newly assigned police officers are. That lasted for about a year. From patrol I was reassigned to our Public Morals Division to perform undercover assignments. My job was to investigate illegal gambling operations and Chinese gang activities.

One of my most memorable cases while in this assignment was convicting four members of two different gangs for the crime of extortion. And to my knowledge, this case was the only successful undercover operation ever conducted by the New York City Police Department against Chinese gangs for extortion.

From the Public Morals Division, I went on to all the types of investigations, such as narcotics investigations and intelligence gathering cases. From my undercover work and other investigative assignments, I was rewarded with a promotion to detective in May 1982. In February 1987, after successfully passing a promotional test, I was promoted to the rank of sergeant.

I believe a measure of success in any organization is the amount of recognition one receives from his superiors. The police department recognizes good work by giving medals to its officers. I have

earned five medals in my career. They have ranged from excellent police work to incidents involving great personal risk.

To give you an idea of what types of situations the police department gives out medals to its officers, I have selected two examples:

The first is the extortion case I briefly touched on. That investigation, I was not in uniform and did not carry identification, identify myself as a police officer, and I generally worked alone without the benefit of backup officers. Basically, my safety and my survival depended on my abilities to deal with situations.

Another case for which I received a medal involved a 6-month investigation into the activities of a group known as the United Bamboo. In this investigation, among other charges, 11 people from across the country were arrested and charged with such crimes as conspiracy to commit murder and conspiracy to import 300 kilograms of heroin into the United States.

Incidentally, the main undercover officer in that case was a 5'5" Korean officer, who was the first Korean American to enter the New York City Police Department.

Another measure of success are evaluations. All of mine have ranged from "meet standards" to "well above standards."

Besides the normal duties performed by a police officer, I have also been delegated other duties. For instance, I have lectured at the police department's executive development course, which is attended by captains and persons above the rank of captain. I have also lectured at the International Asian Organized Crime conferences, which are attended by law enforcement officers from around the world.

And one other important duty I have performed was to provide protective security for dignitaries. In that capacity I have provided security for dignitaries such as President George Bush and President Ronald Reagan. Interestingly, no one ever asked me if I was 5'7" tall when I was delegated these assignments.

I hope that the recall of my police experiences does not appear to be boastful. Indeed that is not my intention. My purpose was to illustrate that the original requirement which disqualified me from police work simply had no merit. The assignments I have performed proved that I am right. My evaluations prove that I am right. And certainly, the promotions I have received prove that I am right.

Through these last 15 years, I believe that I have made some positive contributions to the police department and to society. But more important than my contributions, I am forever grateful to have had the opportunity to serve. Many others are also grateful for the opportunity to serve.

When I entered the police department, there were only nine other Asian officers. Presently, there are approximately 180 Asian officers in the New York City Police Department. I assure you not all of them are more than 5'7" tall.

I remind myself every now and then that none of this would have happened or been possible if it were not for a law known as title VII of the Civil Rights Act of 1964. We are a Nation of laws, hopefully good laws, laws that protect all the people, not just those in positions of power or belong to a privileged class.

Thank you for your time.

Senator METZENBAUM. Sergeant Lum, your testimony is really very assuring and somewhat gratifying. I hope we could make the law that which it was in yesteryear in order that others not be denied the opportunity that you were afforded.

Senator Hatch, I believe that you have a statement that you wish to make at this point?

Senator HATCH. I have to go to the Judiciary Committee.

But I just would like to make the statement that I want to compliment both of you for your testimonies, and I think your stories are good ones.

Ms. Brunet, I am glad you are a firefighter. Anybody that is that dedicated ought to be able to be that, and those standards they were applying I don't think any Federal court in the country before or after *Wards Cove* would have upheld those.

And certainly, Officer Lum, let's be honest about it, you are a terrific human being, I don't think your height makes one hill of beans' worth of difference.

Let me just say this. I appreciate both of your stories, and it is not clear to me that *Wards Cove* changes the result with respect to your cases.

Tests and other criteria such as height requirements and physical requirements must still be job-related and, I would say in the words of the *Wards Cove* case, they have to significantly serve employer interests. So I can't see any Federal judge in this land before or after *Wards Cove* not striking those down and not supporting you in your cases. Indeed title VII does work and it should work.

I don't think *Griggs* has been overturned, and I don't think any credible case can be made that *Griggs* has been overturned, and certainly neither has the *Dothard* decision, which did away with height and weight requirements before *Wards Cove* and still is effective today.

So what I am saying is that I will keep my eyes on all these cases in the future and make sure that the type of discrimination that was utilized against the two of you does not rear its ugly head in any cases, regardless of what we do with this particular piece of legislation.

So I want to compliment both of you and tell you I appreciated hearing your testimony.

Senator METZENBAUM. Senator Kennedy.

The CHAIRMAN. Thank you very much, Mr. Chairman.

We have on the floor the Voluntary Service Act, which will be coming back on the floor in just a few moments and I am going to have to be on the floor to attend to that issue.

But I, too, want to join in first of all thanking you for coming here this morning and telling us of this story, and second, our admiring your perseverance in pursuing these issues of injustice. You deserve a lot of credit because you stuck with it over a very considerable period of time made a big difference in your own lives, which is obvious, but it has made a big, big difference in many other people's lives. And so you really ought to take a great deal of satisfaction.

I don't view the current situation the way my friend, Senator Hatch, views it. We are going to hear some very distinguished rep-

resentatives today telling us about how the result of this *Wards Cove* decision will mean that there are other situations not dissimilar from yours, cases that won't be brought because of that. And they are going to make a very compelling case.

But I want just to ask did each of you—Ms. Brunet, at any time that you have been on as a firefighter, have you ever felt that that test would have been relevant to the performance of your duty in the time that you have been on the force?

Ms. BRUNET. The tasks asked of me during the tests, they aren't relative to what I do on the job. That's all you can say.

The CHAIRMAN. And are there other women now that are firefighters?

Ms. BRUNET. Yes. There are quite a few that have come on after the suit, and I have had the opportunity to work with quite a few.

The CHAIRMAN. They are enjoying it too?

Ms. BRUNET. Yes.

The CHAIRMAN. How many were on the force prior to you?

Ms. BRUNET. I am not sure of the exact number. I think maybe four. Afterwards, I think maybe in the last 2 years, maybe 15 to 16 have been hired.

The CHAIRMAN. A dramatic change.

Ms. BRUNET. Oh, yes.

The CHAIRMAN. Mr. Lum, let me ask you the same question. You had the height limitations. Have you found in the performance of your duty that that kind of a test was relevant to the performance of your duties?

Mr. LUM. No, sir, I do not. And the 15 years of experience now, and after effecting hundreds of arrests and conducting numerous investigations, I feel that I have been exonerated in my feelings that the height requirement in fact was not job-related.

The CHAIRMAN. Well, again I think you both deserve a great deal of credit, and I just want to commend both of you. Thank you very much for sharing your story with us. It is a very commendable one, and the best way that we can express our thanks to you is to make sure that this legislation becomes law.

Thank you, Mr. Chairman.

Senator METZENBAUM. Thank you, Senator Kennedy.

I just want to make a comment regarding Senator Hatch's comment. He suggests that whether or not there had been a *Wards Cove* decision, you would have prevailed.

As I read the law, if you two had to prove the absence of business necessity, you probably would have lost. I don't know if you would have been able to maintain that burden of proof.

I see that Senator Kassebaum has arrived.

Senator, did you have a statement you would like to make?

Senator KASSEBAUM. No, I don't. Thank you, Mr. Chairman. I apologize for coming in late.

Senator METZENBAUM. Happy to have you with us.

I have a couple of questions for the witnesses.

Ms. Brunet, what impact did your lawsuit have in helping more women become firefighters in Columbus?

Ms. BRUNET. Not only did it provide more motivation for women to take the test because maybe they felt they had a better chance

now, but it also allowed, like I said, other women to be hired through this court case.

Senator METZENBAUM. And how about the male firefighters, what has been their reaction to your presence on the force?

Ms. BRUNET. I think we have been well accepted. I think that the more females that are put on the departments, the better reaction you get because you're not such a different person. The first female that was on the fire department didn't receive as well a reaction as the people that were hired in these last 2 years. I think we get along great. I find no problems in my job and the people I work with.

Senator METZENBAUM. Thank you.

Mr. Lum, you stated that New York City never really gave you a reason for the minimum height requirement. But two common rationales for such a requirement were that: One, height was a measure of strength; and two, that the public would have less respect for the authority of short police officers.

In your 15 years as a police officer in New York City, have you ever had any problems commanding the respect of the public or meeting the strength requirements of the job?

Mr. LUM. As to the first part of your question, Senator, no, I have not had any problem commanding respect because of my height.

And as to the second part of your question, no, I have not had any problem with the strength requirements of this job. And I think the contributions and the achievements that I have made over the last 15 years addresses the issues that you are raising.

Senator METZENBAUM. Thank you.

What kind of a message does an employers send to Asians and other ethnic minorities when it says you can't work here unless you are 5'7" tall?

Mr. LUM. I believe the employer is saying that we don't want Asians working here, we don't want females working here, or any other group that on the average does not meet a 5'7" height requirement. For instance, the average Asian male is only 5'5", sir. And on the average, they would not be allowed to work for that employer.

Senator METZENBAUM. I have a question for both of you. To the best of your knowledge, did you get hired under a court-ordered affirmative action plan involving goals, timetables, or quotas?

Ms. BRUNET. Senator, I was not hired under any of those. I would like to say that I was hired because I was qualified.

Senator METZENBAUM. Mr. Lum.

Mr. LUM. No, sir. The same is true in my situation. I was merely given the New York City—all they do is waive the height requirement for me. I still had to pass the written, the physical, the medical, and the character investigation.

Additionally, New York City consented to recruiting in Asian neighborhoods for police officers. But aside from that, there were no quotas or any kind of goals set in my case.

Senator METZENBAUM. I want to thank both of you for your testimony. It has been extremely helpful, very informative, and very persuasive. Thank you very much.

We are very happy to have our next witness, Nicholas Katzenbach.

But before proceeding to our list of witnesses, let me say that the Chair, in a rash moment, agreed to accept more witnesses or to hear more witnesses today than time constraints probably permit. By reason of that fact, the Chair will adhere to a very strict 5-minute limitation rule with respect to each of the presenters this morning. I do hope the witnesses will understand it is not in any way demeaning or deprecating, it is just a question of how many witnesses can you hear within a certain limited amount of time.

The first witness is currently a partner in the law firm of Riker, Danzig, Scherer, Hyland and Perretti, former general counsel of the International Business Machines—IBM. He is the former Attorney General of the United States, certainly a well-respected lawyer throughout this country and has a distinguished past record of public service.

We are happy to have you with us, Mr. Katzenbach. And I guess you heard my statement that there will be a 5-minute limitation. At the end of 4 minutes the yellow light will go on. At the end of 5 minutes the red light will go on. At the end of 6 minutes the executioner arrives. [Laughter.]

Please proceed.

STATEMENT OF HON. NICHOLAS deB. KATZENBACH, PARTNER, RIKER, DANZIG, SCHERER, HYLAND AND PERRETTI, MORRISTOWN, NJ

Mr. KATZENBACH. Mr. Chairman, thank you. Thank you for the opportunity to appear before this committee. You have copies of my written statement, which is quite long.

Senator METZENBAUM. All of the statements will be included in entirety in the record.

Mr. KATZENBACH. Let me speak very briefly to some of the points in it.

I come at this from three different perspectives.

One is from the Department of Justice, where I served eons ago as Bobby Kennedy's deputy. And one of the great moments of my career in public service was when this body voted cloture on the Civil Rights Act of 1964—a very emotional moment, one that I think stands out in our history of the importance of bringing into our society all people and getting rid of discrimination.

I also come at it from almost 20 years as general counsel of a very large corporation, a corporation that I think worked hard to succeed in not discriminating. We had some suits. I believe I am correct in saying that IBM never lost a title VII case or a 1981 case.

I also come at it from private practice. I did help, with one of my partners, provide an amicus brief in *Wards Cove*. I don't claim any great expertise. I am not a title VII lawyer. I am a general practitioner. I have practiced and taught law for some 40 years.

I would like to make two points to this committee about procedures. One is simply that I remember the 1964 act and the great part about that act was that it was a commitment by both of our political parties to cure this wrong. And that, I think, was enor-

mously important, not merely the provisions of the bill but the fact that the Congress of the United States together with the President of the United States had made that commitment. It was a bipartisan commitment.

I might say, because some of you might not remember that the original title VII was a Republican proposal. It was taken from a bill that Senator Griffith of Michigan had introduced. And it was an important part, a very important part, of the 1964 act.

The second point that I would like to make is that I don't see a lot of point in getting the U.S. Supreme Court all mixed up in this. These are interpretations of that act. The court is not telling this committee or this Congress what policies it should adopt. That would not be a proper judicial function. It was simply interpreting, and some of us can disagree with the interpretation, but it was simply interpreting law that you had already enacted.

I read this bill, which I support in all its respects, I read it as simply saying that we wish to, if that is what we did before, in the view of the U.S. Supreme Court, we wish to change that and to make clear that we have some differences, not necessarily with those opinions, but some differences, as it has been interpreted, and therefore we should make moves now to strengthen parts of that bill, of the original title VII and of 1981.

I think both of those points are important, Mr. Chairman, in terms of the attitude with which we go at this.

In addition, and this is probably a point I will repeat, but in addition, it is important to consider what it is we are trying to do. We are not trying to deal with hundreds of lawsuits. What we want to avoid is having those lawsuits. What we want to encourage is employers to get this problem behind us. Some 25 years later, much of it is behind us. But it isn't all behind us. And what we are trying to do is to say lean over backwards, work at it, because if you don't work at it, there is enough bias left in this country that you aren't going to succeed. So work at it.

And one way of encouraging that, one way of making that easier is to strengthen the provisions, as this bill would do.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Katzenbach follows:]

PREPARED STATEMENT OF NICHOLAS KATZENBACH

My name is Nicholas Katzenbach.[1] I appear here today to testify in support of S. 2104, the Civil Rights Act of 1990.

I offer my testimony from three perspectives: First, as Deputy Attorney General under Robert F. Kennedy with responsibility for the Department's legislative program at the time of the enactment of title VII of the Civil Rights Act of 1964; second, as the general counsel of a major corporation during the years that *Griggs* v. *Duke Power*[2] set the standards for proving disparate impact cases under title VII; and third, as an attorney in the private practice of law.

From each of these vantage points, I am convinced that passage of S. 2104 is critical to the welfare of this nation. As a former Attorney General of the United States, I am proud of the progress this nation has made since the days before the passage of title VII. In those days, for example, black persons were totally excluded from many

[1] Senior Partner, Riker, Danzig, Scherer, Hyland & Perretti. Attorney General of the United States in the Johnson Administration; Senior Vice-President and General Counsel, International Business Machines Corporation (IBM) from 1969 to 1986; presently Director on the Board of IBM.

[2] 401 U.S. 424 (1971).

police forces throughout the nation. Despite the changes of the past twenty-six years, however, discrimination has not been eliminated from all workplaces. Given the recent increase in racial incidents, now is not the time to retreat or to tread water in fighting discrimination. We must reinvigorate, not lessen, our commitment to achieving an open and just society for all. As a business executive, I have appreciated the economic necessity of striking down artificial barriers which impede the full utilization of the skills of all of our citizens. The *Griggs* case has been instrumental to setting a clear and constructive tone for the business community. As an attorney, I know how devastating the U.S. Supreme Court's decisions of 1989 have been to the ability of victims of unlawful discrimination to secure and maintain meaningful relief.

But I do not appear here today to criticize the Court or its decisions. After all the Court was merely interpreting legislation, not propounding the meaning of the Constitution. Whether one agrees or disagrees with the majority of the court, there can be no disagreement that the policy judgments involved in this legislation are up to this Congress. I urge it to act favorably on this legislation.

In 1963 and 1964, I spent many hundred hours discussing the 1964 Civil Rights Act with members of Congress. There is no need to remind members of this Committee that enactment of that legislation was a magnificent bipartisan effort by both Democrats and Republicans. I accept and welcome the fact that both parties wish to put an end to the injustices created by discrimination in all its many forms. I hope there is also consensus that the proposals contained in this Civil Rights Act of 1990 will further that goal in a fair and responsible manner. It is heartening that the Administration supports at least part of this legislation, and I hope, when it has fully considered the record before Congress, that it will see fit to support all of it.

This bill deals with the problems stemming from the U.S. Supreme Court's interpretation of Civil Rights Legislation in six U.S. Supreme Court decisions of the last term: *Patterson* v. *McLean Credit Union*;[3] *Lorance* v. *AT&T Technologies*;[4] *Martin* v. *Wilks*;[5] *International Federation of Flight Attendants* v. *Zipes*;[6] *Price Waterhouse* v. *Hopkins*;[7] and *Wards Cove Packing Co.* v. *Atonio*.[8]

I have been asked to focus my testimony today on the part of the legislation addressing the problems raised by the U.S. Supreme Court's interpretation of title VII in *Wards Cove*. I was counsel of record in the *amicus* brief submitted by the Lawyers' Committee for Civil Rights Under Law in support of the minority workers involved in that suit, and therefore have some familiarity with it.

In the days before the passage of title VII, rigid racial segregation was the rule in much of the nation's workforce. Women, regardless of race, were concentrated in a few traditionally female jobs. As a result, vast segments of the population were excluded from being able to compete for most jobs in the workforce. The society as a whole suffered from not being able to call upon its best resources—the talents and abilities of all its people.

Title VII of the Civil Rights Act of 1964 was the catalytic force behind dismantling of the waste of a segregated workforce with its irrational job reservations. Some of you may recall that its provisions were taken from a Republican bill authored by Senator Griffin. During the years since its passage, enormous strides have been made in opening up employment opportunities for women and people of all races and national origins in many workplaces throughout the society.

The workforce at IBM, for example, changed dramatically between 1962 and 1980. In 1962, the company had 750 black employees. In 1968, when I joined the company, the number of black employees had increased ten fold to 7,251. This number more than doubled to 16,546 by 1980. The company significantly integrated its total workforce during this period, doubling its representation of females—from 12.7 percent to 22.2 percent—and increasing its representation of minorities by almost ten fold—from 1.5 percent to 13.7 percent. Between 1971, the year that *Griggs* was decided, and 1980, the numbers of minority and female officials and managers grew from 429 blacks to 1,596, from 83 Hispanics to 436, and from 471 females to 2,350.[9] This was

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[3] 491 U.S. ——, 105 L.Ed.2d 132, 109 S.Ct. 2363 (1989)
[4] 490 U.S. ——, 104 L.Ed.2d 961, 109 S.Ct. 2261 (1989).
[5] 490 U.S. ——, 104 L.Ed.2d 835, 109 S.Ct. 2180 (1989).
[6] 491 U.S. ——, 105 L.Ed.2d 639, 109 S.Ct. 2732 (1989).
[7] 490 U.S. ——, 104 L.Ed.2d 268, 109 S.Ct. 1775 (1989).
[8] 490 U.S. ——, 104 L.Ed.2d 733, 109 S.Ct. 2115 (1989).
[9] See Affirmative Action to Open the Doors of Job Opportunity, A Report of the Citizen's Commission on Civil Rights, Washington, DC, citing Affirmative Action Coordinating Center, *A Statement in Support of Affirmative Action: The IBM Story (1981) (unpublished paper).*

not accomplished through use of quotas, but instead resulted from a clear understanding of what both the law and sound business practices required—fair treatment of all, regardless of race, sex or national origin. It is a good record, in a highly skilled technology, but by no means a unique one.

In 1964, minorities and women working in the public sector and in private companies were found frequently only in stereotypical job categories. These were normally the lowest paying jobs. Many major cities throughout the country had police forces with no—or relatively few—minority or female police officers. Similarly, many fire departments were exclusively all white and all male. The adoption of title VII represented a national recognition that discrimination could no longer be tolerated and that all individuals participating in the society were entitled to equal access to employment opportunities.

The progress that has been made since that time is such that it is difficult to recall that there was a time—just twenty six years ago—when blacks and women could be sure that no matter how qualified they might be there were many, many jobs for which they stood no chance of even being considered. Can one imagine today a city with a significant minority population being policed effectively by an all white police force?

The fact that there has been tremendous progress, however, does not mean that the struggle to achieve a fair and just society is over. Barriers to equal employment still exist and title VII remains a necessary instrument for removing those barriers.[10] Gender and race bias have unfortunately not yet been eradicated from our society. Frequently, these barriers and biases are far more subtle and more difficult to prove than those in the mid-1960's. This is not the time for the nation to signal a retreat from its commitment to fairness and justice in the workforce, nor is it the time to make the laws so narrow that proving discrimination is more difficult and sometimes virtually impossible. It is the time to speed up the process, to put the problem behind us, and to get on with meeting our foreign competitors without the distraction of racial or sexual bias.

Over the next decade and into the Twenty-First Century, the critical issue for our nation will be maintaining and improving its competitiveness and maximizing its human resources. During this period, the greatest growth in the labor force is expected to come from the entrance of women and minorities into the workplace.[11] The country cannot afford to allow doors to be closed to anyone. The legislation before you—S. 2104—is needed to ensure that those doors remain open into the next century.

Wards Cove Packing Co. v. ATONIO

Sections 3 and 4 of S. 2104 deal with the burdens of proof in disparate impact cases and respond to the Court's decision last June in *Wards Cove Packing Co.* v. *Atonio*. The disparate impact approach to employment discrimination has been a potent force in opening up employment opportunities to women and minorities and in eliminating artificial and unnecessary barriers to advancement in the workforce. This approach has not worked solely because of litigation or the fear of litigation, but also because most employers have conformed their conduct to the norms established by good employment practices. Employers who have done so have also reaped the benefits of utilizing the skills of a diverse workforce.

Since 1971, when a unanimous Court, in an opinion authored by former Chief Justice Burger, upheld the disparate impact approach in *Griggs* v. *Duke Power*,[12] it has been settled law that title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." [13] The *Griggs* Court recognized that, in adopting the Civil Rights Act, Congress had required "the removal of artificial, arbitrary, and unnecessary barriers to employment when [such] barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." [14] As the Court made quite clear in *Griggs* and the cases

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[10] Indeed, it was not until 1982 that the first black persons were promoted to any position in the Fire Department of the City of Birmingham, Alabama. These promotions took place as a result of consent decrees entered after eight years of litigation. As late as 1981, bathrooms were still segregated by race in some departments of the City of Birmingham.

[11] *See e.g. Workforce 2000: Work and Workers for the Twenty-First Century*, Hudson Institute, Indianapolis, Indiana, 1987 at xiii: "Only 15 percent of the new entrants to the labor force over the next 13 years will be native white males, compared to 47 percent in that category today".

[12] 401 U.S. 424

[13] *Id.* at 431

[14] *Id.*

that followed it, the issue is not intent—whether the employer is trying to discriminate—but rather the results of the employer's practices. The *Griggs* approach focuses on systemic discrimination which may be unintended or even the product of well-meaning policies which nevertheless operate to the disadvantage of a particular group or groups.

In a nutshell, *Griggs* has meant that selection requirements, practices, procedures or systems which disproportionately exclude members of a particular race, gender, religion or national origin from job opportunities are unlawful unless they are "manifestly related" to the job in question. If they are not sufficiently job related, they cannot withstand legal scrutiny. The "touchstone" of this inquiry, the *Griggs* Court said, is "business necessity".[15] This has been the unquestioned law of the land since 1971. In adopting the 1972 amendments to title VII, Congress made clear that *Griggs* was in keeping with its view of equal employment opportunity and title VII.[16]

Equally well settled, until *Wards Cove*, was the evidentiary model to be used in analyzing disparate impact claims. Since the adoption of title VII, the U.S. Supreme Court has fashioned a variety of models for evaluating evidence when trying to determine whether a violation of the Act has occurred.[17] The critical aspects of these various models have been what must be proved, by whom, and by what amount of evidence. While the models have resembled each other on the surface, each has been tailored to fit a specific situation.

The model laid out by the Burger Court in *Griggs* for considering evidence in cases challenging systemic discrimination—cases where the employers' practices and procedures have a "disparate impact" on one or more groups—contained a careful balancing of the burdens of proof. Once a plaintiff succeeded in establishing that an employment practice operated in a disproportionate fashion to exclude the members of a particular group from consideration, then the burden was placed on the employer to *demonstrate* that this discriminatory practice was actually needed. Whether the language used was "demonstrate", "prove", or "show", the understanding among courts, as well as litigants before the courts, of this burden was that it represented the burden of persuasion on the issue of business necessity.[18]

The Court's opinion in *Wards Cove* has thrown this balance so out of kilter that it undermines the effectiveness of the *Griggs* rule. It does so by erecting evidentiary hurdles that would make it monumentally harder for plaintiffs to prove their cases. In adopting this approach, the Court essentially overturned a long line of authority in its previous opinions and in those of the lower courts on the burden of proof.[19]

The three very troubling aspects of the *Wards Cove* decision are:

(1) its conclusion that an employer need no longer *persuade* a court that a selection procedure shown to have a discriminatory impact on members of an affected group is justified but only need produce evidence of a justification in order to place the burden on the plaintiff of persuading the trier of fact of the lack of business necessity;

(2) its apparent retreat from the "touchstone of business necessity" as the standard to be used in judging an employer's defense of its practices—a standard followed since *Griggs*—to a lower standard suggesting merely that the employer's goals be served by the practice; and finally,

(3) its placing on the plaintiffs the potentially Herculean burden of disaggregating the impact of several practices which operate in combination to form a selection system.

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[15] *Id.*

[16] Legislative reports leading to 1972 amendments of title VII also evince support for disparate impact analysis. H.R. Rep. No. 92-238, pp. 8, 20-22 (1971); S. Rep. No. 92-415, p. 5 and n.1 (1971). *Wards Cove, supra.*, 104 L.Ed.2d at 757, n.9 (Stevens, J. dissenting).

[17] *See e.g.* [disparate treatment models]: *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973); *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981); *Teamsters* v. *United States*, 431 U.S. 324 (1977); [disparate impact model]: *Griggs, supra., Albemarle Paper Co.* v. *Moody* 422 U.S. 405 (1975); *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977) and *Watson* v. *Fort Worth Bank and Trust*, 487 U.S. ——, 101 L.Ed. 827 (1988).

[18] *See e.g. Allen* v. *Seidman*, 881 F.2d 375, at 377 (7th Cir. 1989): "*Wards Cove* returns the burden of persuasion to the plaintiff . . . and also dilutes the 'necessity' in the 'business necessity' defense. . . . (The) 'business necessity' defense (is) now a misnomer, since the defense does not require a showing of necessity and is no longer an affirmative defense. . . ." *See also "Decisions Placing Burden of Proof, etc. on Employer"*, placed in the record of the hearing before this Committee on February 23, 1990 during the testimony of William Coleman.

[19] Justice Stevens in dissent notes the Court's cases and the Courts of Appeal opinions describing the employer's rebuttal burden. *Wards Cove*, 490 U.S. ——, n.14; 104 L.Ed.2d at 755, n.14 (Stevens, J. dissenting).

In each respect, the decision represents a step backward from the law as previously understood. The cumulative effect of these three prongs of the *Wards Cove* decision is to increase exponentially the burden on plaintiffs seeking to challenge a discriminatory procedure or selection system and to lower dramatically the employer's burdens when responding to evidence of a disparate impact.

Sections 3 and 4 of the proposed Civil Rights Act of 1990 would change the evidentiary balance to that which most observers thought existed prior to *Wards Cove*, making it once again feasible for plaintiffs to challenge discriminatory selection devices and systems. The bill does so in three ways. First, it provides that the burden of persuasion as well as production shifts to the employer who must persuade the court of the business necessity behind a practice or set of practices which have been shown to operate in a discriminatory fashion. Second, it restores the high level of exculpatory justification required for a discriminatory practice so that it is clear that the ntouchstonen remains nbusiness necessityn. Finally, it makes clear that a group of employment practices can be challenged on the basis of their cumulative impact. There are sound reasons why the law had developed the way it had prior to *Wards Cove* and sound reasons why the legislation should support that development.

1. *Restoring the Burden of Persuasion on Employers*

One argument being heard in some quarters against these provisions of the proposed bill is that a plaintiff would need only to present statistics of an imbalance in the workforce in order to prevail. This argument misperceives the nature of the plaintiff's initial burden of proof in a disparate impact case. While statistics are the heart of a plaintiff's case, since the impact of a practice or system is most readily seen through a statistical analysis, the statistics used must be carefully tailored to demonstrate the impact of the challenged practices.

The statistical evidence in *Wards Cove* did indeed revolve around racial imbalance in the employers' workforces and it was not very strong. However, as even the majority recognized, the facts of that case were *peculiar*. In the very special and unique circumstances of the seasonal Alaska cannery industry, the use of comparisons between the heavily minority, low-paying cannery jobs and the almost exclusively white, better paying job lines such as carpenter and machinist, was perhaps not an unreasonable approach to measuring the impact of defendants' separate recruiting channels and other practices. Such imbalance statistics would not normally be probative, but the four dissenting Justices and the Ninth Circuit saw these disparities as sufficiently telling in light of the practices identified by the plaintiffs. The legislation before this Committee does not, however, disturb in any way the majority's rejection of internal workforce statistics disregarding legitimate qualifications as a foundation for a plaintiff's statistical case.

A plaintiff's initial burden is not a light one. He or she must demonstrate to the satisfaction of the court that the challenged procedure, requirement, or selection system has led to a disparate impact on the employment opportunities of a particular group or groups. That requires a substantial showing. The courts have only found that showing to be met when a plaintiff has produced statistics and other evidence sufficiently probative to demonstrate that the challenged selection procedure or system has led to the disparity.

It is because of the substantial showing required of plaintiffs to make it over this threshold that the defendant's burden has uniformly been treated as being equally high. Once the plaintiff has demonstrated that the challenged procedure results in a disparate impact, he or she has persuaded the court that the practice has served to limit his or her job opportunities. The question then becomes one of whether a procedure that has been shown to be a barrier to employment opportunities is necessary. ThiS is a question that the employer is best equipped to answer. The employer is only called upon to do so after the plaintiff has succeeded in showing that the challenged procedure has operated to the disadvantage of members of his or her group and have excluded them from job opportunities.

It is both appropriate and fair that the employer—and not the employee—should be the party required to demonstrate that a challenged procedure is indeed necessary to its business. Of the two parties, it is the employer which is, by far, more familiar with its own operations and with the requirements needed for the job at issue. It is the employer who has the access to the records needed to produce the evidence required on this point. Only the employer can be expected to demonstrate the validity of its procedures since validation studies cannot be done simply by reviewing existing records. Prior to *Wards Cove*, employers have been able to satisfy

the heavier burden of persuasion in defending the business necessity of their practices in many cases.[20]

The majority opinion in *Wards Cove* interprets title VII as not requiring this careful balance in burdens, by allowing the defendant to rebut the plaintiff's prima facie case by merely producing evidence of a legitimate rationale for the practice in question without having to convince the court that the procedure has indeed a manifest relationship to the job in question. S. 2104 would return the burden of persuasion to the employer and would make clear that to rebut proof of a practice with discriminatory impact, the employer's evidence of justification must be persuasive.

2. *Establishing a Business Necessity Standard*

Since *Griggs* was decided, the courts have made use of a variety of formulations to express the concept of business necessity and job-relatedness. The U.S. Supreme Court itself has used several alternative formulations. Justice Blackmun expressed the reason behind this in his concurrence in *Watson* v. *Fort Worth Bank & Trust* when he stated that "[p]recisely what constitutes a business necessity cannot be reduced, of course, to a scientific formula".[21]

The idea of adopting a new single governing formulation for the inquiry into business justification was advanced by the United States Department of Justice in its amicus brief in *Wards Cove*.[22] The standard proposed by the United States was one allegedly "encapsulated" in *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 587 n.31 (1979), namely that a challenged practice would be justified as a business necessity where the employer's "legitimate employment goals of safety and efficiency . . . are significantly served by—even if they do not require—[the challenged selection practice].[23] The Court, in large part, followed this suggestion.

Unfortunately, both the standard proposed by the United States in its brief and that adopted by the Court in *Wards Cove* are too low; each represents a sharp retreat from the standard embodied in *Griggs*. A mere "significant" relationship to "legitimate employment goals" is clearly a more flexible and less stringent standard than the test required by the unanimous *Griggs* Court. The *Griggs* Court saw that "Congress has placed on the employer the burden of showing that any given requirement must have a *manifest relationship* to the employment in question" (emphasis added).[24] As *Griggs* made clear, "[t]he touchstone is business necessity."[25]

For the *Wards Cove* majority, however, the "touchstone" of "business necessity" of the unanimous Court in *Griggs* has radically changed. For them, the "touchstone" has become merely "a reasoned review of the employer's justification" and a clear conviction that the challenged procedure need not be 'essential' or 'indispensable' to the employer's business for it to pass mustern.[26] This is a lowering of standards of review comparable to equating strict scrutiny of race-based classifications under the Equal Protection Clause of the Fourteenth Amendment with that Amendment's rational basis test. Irrespective of what standard the Court has used in the past, however, there is nothing inappropriate about the Congress stating now its clear intent.

An example of a practice that might meet the Court's new standard but clearly would fail under *Griggs* is a preference given to current employee's relatives. If an employer produced evidence that hiring employees' relatives increased employee loyalty, would this suffice to meet the "legitimate employment goals" test? If the employer's existing racial pattern was significantly less mixed than the applicant

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[20] Among the examples are: *Black Law Enforcement Officers* v. *City of Akron*, 824 F.2d 475 (6th Cir. 1987), where the Sixth Circuit affirmed the lower court's determination that defendants' evidence of having developed and validated its job knowledge and personality tests was sufficient, and *Cormier* v. *PPG Industries*, 702 F.2d 567 (Sth Cir. 1983), where the Fifth Circuit affirmed the district court's ruling that the defendant had "shown" its tests to be job related "based on empirical evidence collected and analyzed in accordance with sound professional practices and the relevant provisions of the Uniform Guidelines of Employee Selection Procedures." 519 F.Supp. 211, 281 (W.D.La. 1981).

[21] 487 U.S. ——, 101 L.Ed.2d 827, 852 (1988).

[22] Brief for the United States No. 87-1387, pp. 23-25.

[23] In *Beazer*, the Court had not followed the standard that the United States proposed but merely recognized that the district court had made a finding that the defendant's employment goals of safety and efficiency actually did require the exclusion of all users of illegal narcotics. The Court did not adopt a mere "relationship" standard as the employer's burden in a disparate impact case. To the contrary, the Court expressly followed the standard articulated in *Griggs*, noting that the record in *Beazer* sufficiently reflected that the defendant's rule demonstrated a manifest relationship to the employment in question. *Beazer*, 440 U.S. at 587 n.31 (quoting *Griggs*, 401 U.S. at 438).

[24] 401 U.S. at 432.

[25] 401 U.S. at 431.

[26] 490 U.S. at ——, 104 L.Ed.2d at 752-753.

pool, such a preference could have severe racial impact on the employment opportunities of minority applicants.

To the extent that the Court has adopted "serving legitimate employment goals" as a single governing formula for business justification, its choice is too amorphous and too weak. It is appropriate, therefore, for Congress to clarify the standards to be used and to make clear that the *Griggs* formulation of "business necessity" remains intact and signifies more than merely serving legitimate employment goals. S. 2104 provides this key clarification.

I understand that some have criticized the definitional language in Section 3 of the bill which would explain that "required by business necessity" means "essential to effective job performance". This is one of the various formulations used by the Court in its past decisions and is one of those cited by the United States in its *Wards Cove* brief.[27] While Justice Blackmun has put his finger on the problem—namely that business necessity cannot be reduced to a scientific formula—"essential to effective job performance" is a far more accurate expression of the *Griggs* concept of business necessity than the "legitimate employment goals" language of the *Wards Cove* majority. Are there those who would contend that a practice or procedure which discriminates against a segment of the population and is not nessential to effective job performancen should nevertheless pass muster? A responsible employer who uses a practice that discriminates is not going to do so unless it has some essential relationship to effective job performance.

3. *Dealing with Multi-Component Selection Systems*

In Wards Cove, for the first time, the Court placed on the plaintiff the very heavy burden of deciphering out the impact of *each* particular practice when the selection process involves a variety of practices operating as a system. In those circumstances where there are several stages in the selection process and records are available that reflect the outcome of each stage, clearly, identifying the stage or stages in the process causing the exclusion at issue is not a difficult one for either side. Under such circumstances, it would be normal for the plaintiffs to focus their challenge on the one or two practices so identified.

However, the problem arises when there are several practices which operate as a process or are so entwined that their individual impact cannot be readily identified. In those situations, plaintiffs are faced with the nearly impossible task of isolating and sorting out the specific impact of each component separately, even when they operate in tandem. Statistical techniques cannot fill the gap. And the question arises as to how narrowly identified must each practice be.

In its brief in *Wards Cove*, the United States conceded that multi-factor decision-making processes can be challenged and defended as a whole. Specifically, the Government said:

> Of course, a decision rule for selection may be complex: it may, for example, involve consideration of multiple factors. And certainly if the factors combine to produce a single ultimate selection decision and it is not possible to challenge each one, that decision may be challenged (and defended) as a whole.[28]

Similarly, the Uniform Guidelines on Employee Selection Procedures promulgated by the EEOC, Civil Service Commission and Departments of Labor and Justice which specifically provide that disparate impact analysis may be applied to [a]ny measure, combination of measures, or procedure used as a basis for any employment decision.[29]

Of the two parties, it is the employer—with intimate knowledge of its operations and ready access to its records—which is in the better position to resolve these issues. In *Green* v. *USX Corp.*—a case vacated and remanded by the U.S. Supreme Court in the wake of *Wards Cove*—the Third Circuit observed:

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[27] The United States catalogued these in its brief:

This Court's decisions have used different formulations of the substantive standard governing the first stage of the inquiry into business justification that is required once a plaintiff makes out a prima facie case. *See, e.g., Teal*, 457 U.S. at 446 (citation omitted) (" 'manifest relationship to the employment' "); *Albemarle Paper Co.*, 422 U.S. at 425 (" 'job related' "); *Dothard*, 433 U.S. at 329, 331-332 & n.14 ("job related"; "necessary to safe and efficient job performance"; "essential to good job performance"); *Griggs*, 401 U.S. at 431, 432 ("business necessity"; "manifest relationship to the employment"). Because those varying formulations suggest either higher or lower thresholds of justification, it would be useful for this Court to adopt a single governing formulation to guide judicial application.

Brief for the United States No. 87-1387, pp. 23-24.

[28] Brief for the United States No. 87-1387, p. 22 (footnote omitted).

[29] 29 C.F.R. § 1607.16(Q) (emphasis added).

> Applying disparate impact analysis to this employer's hiring 'system' and measuring the disproportionate 'effects' on minority hiring that result may impose a difficult burden on the employer, but not an unfair one. In these cases, the employer has far better access and opportunity than the plaintiffs to evaluate critically the interrelationship of the criteria that it uses in hiring practice, and to determine which aspects actually result in discrimination.[30]

Thus, the approach contained in the proposed legislation regarding group practices is eminently reasonable and supportable.

The Issue of Quotas

One of the arguments made by those who oppose the restoration of *Griggs* is that the adoption of the *Wards Cove* provisions of the proposed bill would leave employers with no options other than to resort to quotas in order to avoid potential liability. TWo things must be said in response to this canard. First, the majority's speculation in *Wards Cove* that "[t]he only practicable option for many employers will be to adopt racial quotas insuring that no portion of his workforce deviated in racial composition from the other portions thereof" [31] is based on the premise of mere racial imbalance *without more* serving as the basis for liability. The legislation before you does not create such a basis. Nor did any decision of the U.S. Supreme Court since *Griggs*.

Second, business reality is such that if a practice or system is indeed causing exclusion of minorities or women, then the employer has two options far more attractive than the adoption of quotas. First, the employer can do what *Griggs* and sound practice say should be done, namely treat the matter as a solvable business problem. Under this approach the employer should reYiew its practices to determine the causes for the disparate results and the necessity of the practice to business operations. If the practice is deemed to be unnecessary, the system can be improved or changed.[32] If the practice is deemed to be necessary, then the employer will and should maintain it, prepared to defend the use of the practice in the unlikely event it is challenged. I can see nothing wrong in encouraging business to review its employment practices when they result in disparate employment. To say that sensible business people will abandon necessary practices is an insult to their business acumen.

Since 1971, the *Griggs* principle has played a critical role in opening up opportunities for *all* members of our society. The ndisparate impactn approach to employment discrimination has been an appropriately tailored evidentiary model for achieving this end. The *Griggs* principle has had a major positive influence on employers—leading those who care about their equal employment posture to examine carefully their selection processes to see if they are arbitrarily and unnecessarily excluding individuals who are otherwise qualified to perform the job in question. Only those who do not care about equal opportunity will seek to take advantage of lesser standards, and those are precisely the employers who should not be permitted to do so. The fair employer need have no concern and will be as unaffected by this legislation as he was by *Griggs*.

As I previously stated, I support the proposed Civil Rights Act of 1990 in its entirety. However, I would like to make particular mention of one other section of the legislation. This is Section 6 which addresses the decision of the Court in *Martin* v. *Wilks*. As a former Attorney General, I cannot stress enough the importance to the legal process of restoration of the principle of finality destroyed by the Martin decision. I fully support the proposition that people should have a right to their day in court prior to the entry of a decree or court order. This legislation provides for such an opportunity.[33] It is fundamental to the rule of law, however, and to the Congressional preference for the settlement of title VII litigation, that judgments of courts not be subject to reopening through endless collateral attacks. Those of you old enough to remember the 1964 and 1965 legislation will recall that it was the tactic of constant relitigation by School Boards, by Voting Registrars, and by other practitioners of segregation which so frustrated racial progress.

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[30] 843 F.2d 1511, 1524 (3rd Cir. 1988), vacated and remanded, 490 U.S. ——, 104 L.Ed.2d 1015 (1989).

[31] 490 U.S. ——, 104 L.Ed.2d at 748

[32] For example, if a 5'6" height requirement for a particular job has adverse impact against women, Asians and Hispanics and the employer concludes that this requirement is not necessary to its operations, the solution is to abolish the requirement, not to establish quotas for women, Asians and Hispanics.

[33] Indeed, if anything, the legislation goes further than necessary to protect the rights of those adversely affected by a court order.

Senator METZENBAUM. Thank you very much, Mr. Katzenbach, for a very succinct and very effective presentation.

Let me just ask you. You served as general counsel for IBM, certainly one of the most respected employers and corporations in this country and one of which we are all very proud.

Did IBM have any problems living up to the business necessity standard of *Griggs*?

Mr. KATZENBACH. No, sir, none at all.

Senator METZENBAUM. And you personally were involved in drafting a brief submitted to the U.S. Supreme Court in the *Wards Cove* case. In your opinion, is the *Wards Cove* decision consistent with the U.S. Supreme Court's precedents under title VII?

Mr. KATZENBACH. I believe, Mr. Chairman, that virtually all observers would have thought, after *Griggs*, that the law was not as it was interpreted 18 years later in *Wards Cove*. Whether that is right or wrong is, it seems to me, immaterial. For 18 years any prudent general counsel would have advised his corporation to have lived by a business necessity rule.

Senator METZENBAUM. And as you see the legislation we have before us, particularly dealing with this subject, do you see where it would impose any difficult burden upon employers of this country?

Mr. KATZENBACH. I don't think that it would impose any difficult burden. It would require those employers who are using tests to continuously look at those tests to, say, if those tests are having an adverse effect on protected groups, on minorities, on women, if they are having an adverse effect, then it would require them to look at those tests and say, "Do we really need this? Is this really important to the effective working force that we do need?" And if they were satisfied that it was, they would do it.

But I do think that looking at them, very often you find, and I think it has come out in the hearing, very often you find that you don't really need that test. It may be in your mind related, job-related, yes. It may be that you think, "Well, maybe that would help improve it." But if you really ask yourself the question, "Do I really need that? Do I really need that for an effective workforce," I think very often you would say, "No. I don't need that." And if you really felt you did, there is nothing in this bill that would prevent you from having it.

Senator METZENBAUM. Senator Kassebaum.

Senator KASSEBAUM. Well, Mr. Chairman, first I apologize for my voice, and I won't ask very many questions because of that.

This is an opportunity to take advantage of someone who has had such keen legal experience in this whole arena of civil rights, and I am not a lawyer, but regarding *Wards Cove*, I would like to ask a couple of questions.

I wonder if you could describe, Mr. Katzenbach, how one would go about proving that an employment practice is essential to job performance?

Mr. KATZENBACH. Well, I would think that would be relatively simple for at least the kind of corporation that I have worked for and, I would think, for most.

I would go about it by saying what are the jobs I am hiring people for? What is they have to do in that job? And I would look

at those qualities that I had to have in order for that person to be effective in that job.

And then I would say what kind of employment practice, what kind of test, if I need tests; what kind of educational background, if I need that; what kind of physical do I need for that? And I say need. That is what business necessity is: Need.

And then I would apply it, and if I found—and I think this is important, Senator—if I found that when I had devised what I thought were good tests, that those were operating in a way that were excluding, let us say, women, I would want to look hard at the features of that test that were being failed under which women were not qualifying, to take another look and say, "Do I really need those?"

Senator KASSEBAUM. Well, in the case of *Wards Cove*, as I understand it, it was the question of the cannery or noncannery type positions, which would seem to me at that point call in two different types of skills.

Mr. KATZENBACH. I think it certainly would call in two different kinds of skills. I agree with that, Senator. Had they in their recruiting taken that into account, they would have had no trouble.

My problem with *Wards Cove*—and if you read the brief we wrote, you will see it was the problem—I think *Wards Cove* was a weak case on prima facie evidence because of the kind of recruitment that they had in that case. And I can see that that would be confusing because of the fact that they were recruiting in two different areas.

I think the real problem was why were they doing that? Sure they needed a lot of unskilled workers, and they needed some skilled workers. And the real question was: How were they recruiting on the skilled workers? And they weren't giving the people in the seasonal employment the opportunity to qualify for those jobs.

Particularly, the statistical comparison was very weak in *Wards Cove*. There's no question about that.

Senator KASSEBAUM. Is my time up?

Senator METZENBAUM. No, no. It's all right.

Senator KASSEBAUM. Would you have any problem with the burden of proof being on the plaintiff?

Mr. KATZENBACH. Yes. I don't see why we should make an exception in title VII to the normal rule of law that an affirmative defense requires the burden to be put on the person asserting it. And I can't believe that the Congress really focused on that and intended to change that. But I don't see any reason to adjust the rule.

It is normal, when the evidence is in your hands, when you are the person who knows why you have those tests, you are the person who is policing those tests, you are the person who is looking at them and you are the person who is asserting this is necessary, then you ought to have the burden of saying why do I assert that.

Senator KASSEBAUM. To it being essential to job performance?

Mr. KATZENBACH. Yes.

Senator KASSEBAUM. And it would be difficult, you're saying, for the plaintiff to show?

Mr. KATZENBACH. Oh, in many instances, the plaintiff, I think, could probably show it if the records were kept.

One of the problems I have with weakening in any way a standard of business necessity or not asserting a tough standard of business necessity, as I said at the outset, your purpose here surely is to try to achieve the hiring of minorities whenever that can be done without hurting and damaging in some way the job performance that is required in that business.

Now, one of the ways in which you do that, Senator, is to encourage employers, who are giving tests and who feel they have to, to keep relooking at those tests, to say are those really necessary, and to keep those records, because particularly if they have the burden of showing that this is necessary, they will keep those records that show it. And if you give them a much lesser test, then it seems to me they are not going to keep them.

Now, if they have those records and they have kept them, then I think the burden of proof makes relatively little difference.

Senator KASSEBAUM. Thank you.

Senator METZENBAUM. Thank you.

Senator Jeffords.

Senator JEFFORDS. Thank you.

While Senator Kassebaum was asking questions along the line that I have in here, which is the very difficult part of the burden of proof. It is a little bit hard to articulate to the general public. But for those of us who have been in the legal profession, I think we understand that this creates a very serious problem.

Mr. KATZENBACH. No, I don't agree with that, Senator. I don't believe that it does create a serious problem. It has not for me, with 19 years at IBM, created a serious problem.

Senator JEFFORDS. No, I am saying as to who has the burden of proof.

Mr. KATZENBACH. Oh, that.

Senator JEFFORDS. I'm sorry.

Mr. KATZENBACH. All right. I'm sorry.

Senator JEFFORDS. I am in favor of this bill. [Laughter.]

You may have made an assumption.

Mr. KATZENBACH. Good. I am delighted.

Senator JEFFORDS. I am with you. Yes. [Laughter.]

The U.S. Supreme Court kind of leaned on the new discovery procedures as being an answer to this difficulty which some of us see in the shift as to who has the burden of proof.

I wonder if you would comment from especially an employers' point of view—I think you have answered a lot of that as to the record problem—but as to whether or not a plaintiff, especially in view of the fact there are no real requirements for keeping records, the difficulties that that presents to a plaintiff in trying to prove that there is a business necessity for the disparity?

Mr. KATZENBACH. I think, Senator, unless he has a lot of records, it is very difficult to prove that fact because he is going to simply run up against a lot of testimony from people on the other side that are simply going to say that he has no—I am going to base it on their experience. He won't have the evidence through discovery if they don't keep the records.

If they do keep the records, he will have the evidence, and probably at that point, if they have kept their records very faithfully, they probably had a pretty good case for business necessity.

So I do think that the discovery is not in itself an answer. What you want to do is to make sure that they have kept the records, but beyond that you want to make sure they are trying to achieve this objective.

When I went to IBM, they had relatively few women and blacks in positions, and they made a major effort to say in a very high-technology company, "That's wrong." And Tom Watson was determined to keep that from happening. And it means reexamining all the things you're doing and, you know, reexamining your biases, your stereotypes.

I remember at IBM they didn't want women salesmen in the typewriter division because typewriters weighed 60 pounds and all the men were saying, "Well, they can't lug those up and down stairs and visit people." They never gave the women a chance to do it. We said, "Well, they do weigh 60 pounds. Give them a chance. If that's what they want to do, let them carry that 60 pounds up and down." They didn't have a portable typewriter at that time at IBM. That sort of overprotective thing. There is a lot of sensitizing of management. But I mean a real effort to accomplish this. And I think that is what you want to encourage.

Senator JEFFORDS. Another criticism that is raised or answered to our problems is the fact that the demographics of the workforce are such that the necessity for hiring women and minorities is going to be so great that no business is going to able to discriminate anyway.

What comments do you have on that?

Mr. KATZENBACH. I would certainly agree, Senator, that we are going to need in the society that is emerging and the high-technology society, we are going to need all of the new entrants, all of the women and all of the others into this society, into this workplace. I don't know that that is going to prevent discrimination. Surely it is a pressure against it. But on the other hand—and here I get way away from this subject—that is something we had better pay attention to in our education in this society and we better make sure that people are qualified to do that, or, even with no discrimination, the workforce will not be as it could be.

Senator JEFFORDS. Thank you, Mr. Chairman.

Senator METZENBAUM. Thank you very much, Senator Jeffords.

Thank you very much, Mr. Katzenbach. Your testimony has been extremely helpful.

Our next panel consists of Mayor William Hudnut III, of Indianapolis, speaking on behalf of the U.S. Conference of Mayors; Attorney General Robert Abrams of the State of New York; William Burns, senior consultant to Pacific Gas and Electric, San Francisco; James Paras, senior partner in the law firm of Morrison and Foerster, on behalf of the U.S. Chamber of Commerce; Professor Paul Andrisani from Temple University in Philadelphia.

Now, with the indulgence of the other witnesses on the panel, Professor Andrisani has a conflict in his schedule and has asked that he be allowed to testify first. At the end of his testimony there will be a short period for questions. Then he will be excused from the panel and then we will return to the regular order.

Mr. Andrisani, we are happy to hear from you. You know of our 5-minute rule, which will be observed strictly.

Mr. ANDRISANI. Thank you, Senator.

By the way, I should note that as long as I leave by 11:45 a.m., I will be fine. So I might just stay and hear the rest of the panel and sneak out at that point, if I can, without disrupting things.

Senator METZENBAUM. Under those circumstances, I wonder if you would mind, then, if we went in the normal order, and I think we had planned to hear Mayor Hudnut speaking first. You say 11:45 a.m. is your time?

Mr. ANDRISANI. Yes.

Senator METZENBAUM. OK. Thank you.

Mayor Hudnut.

STATEMENTS OF HON. WILLIAM H. HUDNUT, III, ON BEHALF OF THE U.S. CONFERENCE OF MAYORS, INDIANAPOLIS, IN; HON. ROBERT ABRAMS, ATTORNEY GENERAL, STATE OF NEW YORK, NEW YORK, NY, ACCOMPANIED BY PETER SHERWOOD, NEW YORK STATE SOLICITOR GENERAL; WILLIAM C. BURNS, SENIOR CONSULTANT, PACIFIC GAS AND ELECTRIC, SAN FRANCISCO, CA; JAMES C. PARAS, ESQ., SENIOR PARTNER, MORRISON AND FOERSTER, SAN FRANCISCO, CA; AND PAUL ANDRISANI, PROFESSOR, TEMPLE UNIVERSITY SCHOOL OF BUSINESS AND MANAGEMENT, PHILADELPHIA, PA

Mr. HUDNUT. Thank you very much, Mr. Chairman and members of the committee. My name is Bill Hudnut. I am the mayor of Indianapolis and also chairman of the U.S. Conference of Mayors Subcommittee on Civil Rights. I appear before you to express my appreciation for this legislation and our support for the Civil Rights Act of 1990.

At the annual meeting of the Conference of Mayors in June of last year, there was a lot of concern about what had happened as a result of the U.S. Supreme Court decisions, a lot of concern about the way in which the U.S. Supreme Court decisions in 1989 would adversely impact efforts that had been made over the years by local Government officials of all different partisan political stripes to mainstream opportunities for women and minorities in the life of their cities.

We asked, through a policy resolution, if the Congress would consider enacting legislation that would protect local affirmative action programs and reaffirm the effectiveness of title VII of the Civil Rights Act of 1964 and assure that this Nation has strong, equitable, enforceable laws with regard to employment and with regard to civil rights.

It is our feeling, sir, that without positive, proactive Government action, there will be very little change. Most mayors support, consequently, affirmative action programs. We realize the problem with proving discrimination and establishing rigid quotas. We are interested in doing what we can to affirm a commitment to equal opportunity by moving ahead in ways that are legal and will be upheld by the U.S. Supreme Court.

I personally am very concerned about what I perceive to be a setback in the civil rights movement as a result of the recent decisions of the U.S. Supreme Court. I am not an attorney. I cannot

thread my way through all the legal niceties. I respect their right to make their decisions.

But I hope that Congress will look at this problem and rectify the situation because of the system at the grass-roots is left to its own devices, the consequence will be that white males will undoubtedly get most of the jobs through the "good old boy network." And I don't think that's right.

In Indianapolis over the last 15 years, as a result of our voluntary efforts in this arena—and we have been up and down the trail twice with the Justice Department, once telling us we weren't doing enough, second telling us we were doing too much.

But in the last 15 years, the number of blacks in the Indianapolis Police Department has increased from 9.8 percent to 16.7 percent, the number of females from 6.8 percent to 14.9 percent; and in the Indianapolis Fire Department, from 7.9 percent minorities in late 1975 to 17 percent in 1990, and from zero women in 1975 to about 3.0 percent of the total workforce right now.

The court's unanimous ruling in *Griggs* v. *Duke* served us well for 18 years. In the years since the 1971 U.S. Supreme Court decision in *Griggs*, cities across the country have revised their hiring and promotion procedures in order to eliminate practices which have the effect of excluding qualified women and minorities from their workforces.

A number of cities adopted equal opportunity or affirmative action plans, either voluntarily or as a result of court-approved settlements. *Wards Cove* transferred the burden of proof to the victim, who must now prove that the employer has no legal justification for its exclusionary practices. And this has caused a lot of concern among many city officials, and this is itemized and detailed in the report that the U.S. Conference of Mayors is putting out today.

We see restoration of the *Griggs* rule as critical to prohibiting discrimination in employment and to strong enforcement of our civil rights laws.

Then if you want to turn to *Martin* v. *Wilks*, the effect of that decision has been to increase uncertainty among many employers, particularly public employers, about the legality of their affirmative action programs and to encourage needless, time-consuming, and expensive litigation.

We just completed a study in the U.S. Conference of Mayors on equal employment opportunity programs in cities. One fifty-three cities responded. One hundred thirty-six of them do have equal opportunity or affirmative action plans. Officials in 93 percent of those cities feel that their plans had a positive beneficial effect overall in their communities.

Affirmative action plans are working well in city Governments. The court's decisions send negative messages regarding them and create an atmosphere of incredible uncertainty.

So we support this legislation. We thank you for introducing it. It has been said that the letter killeth but the spirit giveth life. These U.S. Supreme Court decisions make me and others question whether this spirit is still alive.

Our Nation must have a spirit of compassion. It must understand that there are people in our society who have been excluded from the mainstream of opportunity for too long and that without some

kind of proactive Government policy they will continue to be excluded.

The system will not correct itself. If we don't have policies in both the public and private sectors which provide opportunities for women and minorities, the unfortunate fact of the matter is that they will continue to be excluded and white males will be favored in the hiring and promoting decisions.

I assure you of our strong support for the Civil Rights Act of 1990 and appreciate the opportunity to share my views with you today.

Senator METZENBAUM. Thank you very much for an excellent statement, Mr. Hudnut.

[The prepared statement of Mr. Hudnut follows:]

PREPARED STATEMENT OF WILLIAM HUDNUT III

Chairman Metzenbaum, Members of the Committee, I am William Hudnut, Mayor of Indianapolis and Chairman of the U.S. Conference of Mayors Subcommittee on Civil Rights. It is my honor to appear before you this morning as a representative of the Nation's Mayors to congratulate you on your prompt legislative response to last spring's Supreme Court decisions. These decisions departed radically from those of the last 20 years, weakening the effectiveness of Title VII of the Civil Rights Act and making it more difficult to ensure equal opportunities in employment for all Americans. We are pleased to lend our support to the Civil Rights Act of 1990.

The annual meeting of the Conference of Mayors was held in June of last year just a few days after the decision in *Martin* v. *Wilks* was handed down. At that meeting Mayor Richard Arrington of Birmingham (whom I believe will testify before you next week) and I sponsored a policy resolution which put the mayors on record as deploring last spring's Supreme Court decisions relating to discrimination in employment—specifically *Wards Cove* v. *Atonio* and *Martin* v. *Wilks*—and called upon the Congress to enact legislation that would protect local affirmative action plans, reaffirm the effectiveness of Title VII of the Civil Rights Act of 1964, and assure that this Nation has strong and enforceable fair employment laws. This resolution was adopted unanimously by the U.S. Conference of Mayors. Your legislation, Mr. Chairman, responds to our call.

I know that the subject of this particular hearing is the *Wards Cove* decision, and I intend to address it. But I also want to take some of my time to discuss affirmative action programs underway in cities and our concerns regarding *Martin* v. *Wilks*.

Wards Cove v. *AtonioT1*

The court's unanimous ruling in *Griggs* v. *Duke Power Co.* served us well for 18 years. In the years since the 1971 Supreme Court decision in *Griggs* v. *Duke Power*, cities across the country have revised their hiring and promotion procedures in order to eliminate practices which had the effect of excluding qualified women and minorities from their workforces. A number of cities adopted equal opportunity or affirmative plans, either voluntarily or as the result of court-approved settlements.

Wards Cove transferred the burden of proof to the victim, who must now prove that the employer has no legal justification for its exclusionary practices. This has caused concern among many city officials. Following are comments from officials in several different cities from across the country:

Birmingham, AL: "The effect of *Atonio* is to exclude population racial composition as a factor in even making a prima facie case of racial discrimination where the facts show an almost complete void of minorities in the work force.

Boise, ID: "With the knowledge that employees now may bear the burden of proof, fewer employees with legitimate claims may take formal action for fear of being further victimized by the system. Employers bent on discriminating are bound to come up with creative, albeit damaging, means and rationale for their actions."

Denton, TX: "It is our view that the *Wards Cove* decision represents a regression in progress toward equal employment opportunity. when it becomes difficult to prove discrimination in a work environment, the ability of our Nation to overcome subtle discrimination practices becomes even more difficult."

Salt Lake City, UT: "Shifting the burden of proof may require proving 'intent,' which is almost impossible to prove."

Louisville, KY: "The burden of proof on protected classes has increased, thereby making it more difficult for a person to challenge perceived discriminatory employment practices. Since the use of statistics has been severely undermined, employment discrimination will be more difficult to prove."

We see restoration of the *Griggs* rule as critical to prohibiting discrimination in employment and to strong enforcement of our civil rights laws.

Martin v. *Wilks*

The effect of *Martin* v. *Wilks has been to increase uncertainty among many employers, particularly public employers, about the legality of their affirmative action programs and to encourage needless, time-consuming and expensive litigation. I would like to share with you now the results of a report just completed by the Conference of Mayors on equal employment opportunity programs in cities.*

Of the 153 cities from 41 States and Puerto Rico which participated in our study, 89 percent (136) have equal opportunity or affirmative action plans. As a result of these plans:

Outreach to the minority community through minority media, colleges and organizations has been established in nine out of ten (122) of the cities.

Testing or screening procedures have been revised in one-half (68) of the cities.

Hiring procedures have been changed in just over one-half (69) of the cities.

Promotion procedures have been changed in 32 percent (43) of the cities.

Goals and timetables for minority or female hiring and promotion have been established in 72 percent (98) of the cities.

Officials in 93 percent (126) of the 136 cities feel that their plan has had positive results overall. Local affirmative action plans have:

Increased job satisfaction in 32 percent (43) of the cities;

Improved labor management relations in 44 percent (60) of the cities;

Improved efficiency and productivity in 29 percent (40) of the cities;

Helped to identify relevant qualifications for certain jobs in 62 percent (84) of the cities;

Contributed to the improvement in the delivery of public services in 40 percent (55) of the cities; and

Contributed to an improved perception by the public of the quality of the services delivered by the city in 48 percent (65) of the cities.

I should note that 22 percent (34) of the 153 cities are currently acting pursuant to a consent decree or court order in regard to their hiring or personnel practices.

Let me brief you on our experience in Indianapolis: Despite a challenge by the U.S. Department of Justice in the mid-1980's, the Indianapolis affirmative action plan has opened the doors of economic opportunity in our police and fire departments. Currently 16.7 percent of the police department is black, compared to under 10 percent before we started our plan. The fire department has seen similar progress, more than doubling the number of blacks working as firefighters. Likewise for women, the statistics show progress toward balancing the makeup of our public safety personnel.

Affirmative action plans are working well in city governments. The court's decision in *Martin* v. *Wilks* sends a negative message regarding them and creates an atmosphere of incredible uncertainty. Again comments from officials in several of our cities:

Boston, MA: "For voluntary affirmative action plans to work, a strong enforcement mechanism must be in place. The court's decision may render voluntary plans useless."

Santa Fe, NM: "Employers will experience increased litigation from protected and unprotected groups."

Rock Hill, SC: "We will see a significant rise in the challenge to and defeat of equal opportunity/affirmative action plans. Consequently, many municipalities will abandon the plans along with equal opportunity. The results could be devastating."

Danbury, CT: "The Supreme Court decision in *Martin* v. *Wilks* opens the door for frivolous challenges to well meaning affirmative action plans."

Saginaw, MI: "The decisions will result in more litigation."

Reno, NV: "Most of our equal employment opportunity/affirmative action guidelines have been implemented on a voluntary basis through the city of Reno's affirmative action plan. The *Martin* v. *Wilks* case serves as a catalyst to destroy meaningful and voluntary steps created to promote equal employment opportunity."

Birmingham, AL: "*Wilks* renders it practically impossible to settle a title VII case since no one can tell with certainty all the persons who must be joined in the litigation."

Indeed, we are already aware of legal actions which have been brought in a number of cities:

In Birmingham a number of reverse discrimination cases are now pending on remand as a result of *Martin* v. *Wilks*.

In Omaha, white male employees have sued, alleging the promotion of minority and female candidates was unlawful reverse discrimination.

In Boston two groups of white police and fire applicants who scored 98 and 99 on civil service tests have challenged the consent decree.

In Memphis, a lawsuit which challenges the promotional process set forth in the consent decree has been filed. We understand that such actions have also been taken in San Francisco, Oakland, Albany (GA), Toledo, Cincinnati, Gadsden and Cleveland.

We support the approach to remedying this problem taken in the Civil Rights Act of 1990. While notice to persons who might be adversely affected by a proposed court order is guaranteed and any such person is provided a reasonable opportunity to challenge that order, subsequent lawsuits challenging the court order would be barred.

It has been said that the letter killeth but the spirit giveth life. These Supreme Court decisions make me question whether the spirit is still there. Our Nation must have a spirit of compassion; it must understand that there are people in our society who have been excluded from the mainstream of opportunity for too long, and that without some kind of proactive government policy they will continue to be excluded. The system will not correct itself.

If we don't have policies in both the public and private sectors which provide opportunities for women and minorities, the unfortunate fact of the matter is that the "good ol' boy" network will prevail and most of the decisions will favor white males.

Again, I assure you of our strong support for the Civil Rights Act of 1990 and appreciate the opportunity to share my views with you today.

EQUAL EMPLOYMENT OPPORTUNITY PRACTICES IN CITY GOVERNMENTS: A REPORT ON THEIR STATUS AND ON THE IMPACT OF RECENT SUPREME COURT DECISIONS INTRODUCTION

The United States Conference of Mayors and the Citizens Commission on Civil Rights have collaborated on an examination of equal employment opportunity programs in city governments and of the effects that several recent Supreme Court decisions have had on them. The information collected reveals the positive effects of affirmative action programs in cities; it also reveals that the Supreme Court decisions, particularly *Wards Cove* v. *Atonio* and *Martin* v. *Wilks*, have created apprehension and uncertainty on the part of city officials over what were, until last June, well-established practices designed to provide equal employment opportunities.

In the years since the 1971 Supreme Court decision in *Griggs* v. *Duke Power*, cities across the country have revised their hiring and promotion procedures in order to eliminate practices which had the effect of excluding qualified women and minorities from their workforces. A number of cities adopted equal opportunity or affirmative plans, either voluntarily or as the result of court-approved settlements.

In a 1986 survey by The U.S. Conference of Mayors, nearly 90 percent of the cities responding reported that affirmative action programs had helped to identify relevant qualifications for certain jobs and well-qualified candidates for employment. A considerable number of cities reported that affirmative action programs had improved personnel practices by leading to improvements in recruitment, hiring and promotion procedures and standards.

AFFIRMATIVE ACTION PROGRAMS IN CITIES

Information collected in early 1990 reveals continuing support for affirmative action by city officials:

Of the 153 cities from 41 states and Puerto Rico which participated in the study, 89 percent (136) have equal opportunity or affirmative action plans. As a result of these plans:

Outreach to the minority community through minority media, colleges and organizations takes place in nine out of 10 (122) of the cities.

Testing or screening procedures have been revised in one-half (68) of the cities.

Hiring procedures have been changed in just over half (69) of the cities.

Promotion procedures have been changed in 32 percent (43) of the cities.

Goals and timetables for minority or female hiring and promotion have been established in 72 percent (98) of the cities.

Officials in 93 percent (126) of the 136 cities feel that their plan has had positive results overall. Local affirmative action plans have:

increased job satisfaction in 32 percent (43) of the cities;
improved labor management relations in 44 percent (60) of the cities;
improved efficiency and productivity in 29 percent (40) of the cities;
helped to identify relevant qualifications for certain jobs in 62 percent (84) of the cities;
contributed to the improvement in the delivery of public services in 40 percent (55) of the cities; and
contributed to an improved perception by the public of the quality of the services delivered by the city in 48 percent (65) of the cities.

Two cities reported that their equal opportunity or affirmative action plans had had an overall negative result. Three cities said their plans had had no effect.

Twenty-two percent (34) of the cities are currently acting pursuant to a consent decree or court order in regard to their hiring or personnel practices for at least some of their employees. These cities are:

Scottsdale, AZ; Birmingham, AL; Los Angeles, CA; Oakland, CA; Denver, CO; Stamford, CT; Jacksonville, FL; Macon, GA; Dolton, IL; Fort Wayne, IN; Indianapolis, IN; Kenner, LA; Baltimore, MD; Boston, MA; Brockton, MA; Dearborn, MI; Lincoln Park, MI; Madison Heights, MI; Pontiac, MI; Saginaw, MI; Minneapolis, MN; Saint Paul, MN; Saint Louis, MO; Omaha, NE; New Rochelle, NY; Rochester, NY; Reno, NV; Bedford Heights, OH; Cleveland, OH; Columbus, OH; San Juan, PR; Memphis, TN; Fort Worth, TX; Roanoke, VA.

Dearborn, Madison Heights, San Juan and Memphis are operating under consent decrees, but do not have affirmative action plans. The remaining cities listed above do have affirmative action or equal opportunity plans.

THE EFFECT OF THE SUPREME COURT DECISIONS

While a majority of the study cities do not report a specific impact yet from the Supreme Court's decisions handed down last year, many do report actions that have already been taken since last June: Seventeen study cities have modified or changed components of their equal opportunity or affirmative action plans as a result of the Supreme Court decisions. These cities are:Santa Monica, CA; Danbury, CT; Middletown, CT; Stamford, CT; Waterbury, CT; Normal, IL; South Bend, IN; Louisville, KY; Cambridge, MA; Taunton, MA; Minneapolis, MN; Lincoln, NE; Sparks, NV; Albany, NY; Cleveland, OH; Hampton, Va; Wausau, WI.

Ten study cities anticipate future changes in their plans as a result of the Supreme Court decisions: Birmingham, AL; Waterbury, CT; South Bend, IN; Cambridge, MA; Minneapolis, MN; Saint Paul, MN; Sparks, NV; Santa Fe, NE; Cleveland, OH; and Portland, OR.

Twelve study cities report that they have received a formal or informal request to reconsider hiring or employment practices. They include Birmingham, AL; Carson, CA; Denver, CO; Boston, MA; Omaha, NE; Sparks, NV; Wilmington, NC; Memphis, TN; and Beaumont, TX.

Nine study cities report that legal actions have been taken to challenge their employment practices. Among them are Birmingham, AL; Oakland, CA; Denver, CO; Boston, MA; Omaha, NE; Sparks, NV; Memphis, TN; and Beaumont, TX.[1]

In Birmingham a number of reverse discrimination cases are now pending on remand as a result of *Martin* v. *Wilks*.

In Oakland, 10 white and Hispanic male applicants for firefighter positions, and Local 55 of the International Association of Firefighters, have brought suit against the City alleging that a May 1986 consent decree unlawfully discriminates against them on the basis of race and gender.

In Omaha, white male employees have sued, alleging the promotion of minority and female candidates was unlawful reverse discrimination.

In Boston two groups of white police and fire applicants who scored 98 and 99 on civil service tests have challenged the consent decree.

In Memphis, a lawsuit which challenges the promotional process set forth in the consent decree has been filed.

Not all problems are reflected in numbers, however. Officials from a number of cities expressed concerns about the adverse impact of the Supreme Court decisions on their recruitment, hiring and promotion practices. Among their comments:

Boston, MA: "For voluntary affirmative action plans to work, a strong enforcement mechanism must be in place. The court's decision may render voluntary

[1] The Lawyers' Committee for Civil Rights Under Law has identified cases as well in San Francisco, CA; Albany, GA; Toledo, OH; Cincinnati, OH; and Gadsden, AL.

plans useless. Such plans may now be at the mercy of uncooperative political bodies."

Santa Fe, NM: "Employers will experience increased litigation from protected and unprotected groups."

Rock Hill, SC: "We will see a significant rise in the challenge to and defeat of equal opportunity/affirmative action plans. Consequently, many municipalities will abandon the plans along with equal opportunity. The results could be devastating."

Danbury, CT: "The Supreme Court decision in *Martin* v. *Wilks* opens the door for frivolous challenges to well-meaning affirmative action plans."

Saginaw, MI: "The decisions will result in more litigation."

Reno, NV: "Most of our equal employment opportunity/affirmative action guidelines have been implemented on a voluntary basis through the City of Reno's Affirmative Action Plan. The *Martin* v. *Wilks* case serves as a catalyst to destroy meaningful and voluntary steps created to promote equal employment opportunity."

Birmingham, AL: "The effect of *AtonioT1 is to exclude population racial composition as a factor in even making a prima facie case of racial discrimination where the facts show an almost complete void of minorities in the work force. Wilks* renders it practically impossible to settle a Title VII case since no one can tell with certainty all the persons who must be joined in the litigation."

Boise, ID: "With the knowledge that employees now may bear the burden of proof, fewer employees with legitimate claims may take formal action for fear of being further victimized by the system. Employers bent on discriminating are bound to come up with creative, albeit damaging, means and rationale for their actions. Normally, consent decrees are not entered into unless there has been a history of illegal discrimination which is verifiable and the effects of which are observable. Plaintiffs in future discrimination cases will likely refuse to settle until a court-ordered remedy is in place. The cost to employers will be astronomical and full remedy will occur over a much longer time."

Kankakee, IL: The decisions are an "impediment (to equal opportunity) with regard to set asides and the burden of proof being put on the plaintiff. Also, there will be the burden of added paper work."

Denton, TX: "It is our view that the *Wards Cove* decision represents a regression in progress toward equal employment opportunity. When it becomes difficult to prove discrimination in a work environment, the ability of our nation to overcome subtle discrimination practices becomes even more difficult. A jurisdiction strives to overcome discrimination practices by entering into a consent decree and then is faced with further legal challenges....The citizens suffer as time, money and effort are put forth in these endeavors when that time, money and effort could be more productively used to improve services to the citizens.

"The *Martin* decision, too, seems to be detrimental to previous progress."

Pontiac, MI: "An alleged victim may find it difficult to prove a case against an employer."

Cambridge, MA: "It shifts the burden of proof in employment discrimination cases to the victim, which is unfair. The burden of proof not to discriminate should be on the employer...not the employee."

Salt Lake City, UT: "Shifting the burden of proof may require proving 'intent,' which is almost impossible to prove. (The decisions) may impact goals and timetables, which are essential to successful affirmative action programs."

Louisville, KY: "The burden of proof on protected classes has increased, thereby making it more difficult for a person to challenge perceived discriminatory employment practices. Since the use of statistics has been severely undermined, employment discrimination will be more difficult to prove."

Bellingham, WA: "We are committed to affirmative action. We do not want constitutional support for our policy weakened."

St. Louis, MO: "The decisions foster confusion among management officials as to the status of the laws under which they operate in following EEO programs and requirements."

Indianapolis, IN: "I'm concerned about what I perceive to be a set-back in the civil rights movement with the recent decisions of the Supreme Court. I respect their right to make these decisions, but I hope that Congress will look at this problem and rectify the situation. If it is left on its own, it will simply mean that white males will probably get all of the jobs through the 'good ol' boy' network."

Gastonia, NC: "The recent Supreme Court decisions may indirectly impede us and many other organizations from providing equal opportunity in employment be-

cause of the message they send and the climate they create....Whether or not the decisions provide legal impediments, I certainly feel that the tone created by the decisions negates a positive change of attitudes related to equal employment opportunities."

Lansing, MI: "As more information regarding these decisions is disseminated, opponents to affirmative action/equal employment opportunity will use them to fight implementation of programs. This will have a chilling effect on the overall impetus to achieve affirmative action/equal employment opportunity objectives."

South Bend, IN: "We believe that the decisions handed down by the Supreme Court make it almost impossible to have an affirmative action plan. Any plan must have a sufficient factual basis, and must be narrowly tailored to meet a specific remedy. Accordingly, a long range affirmative action plan is probably obsolete."

Waterbury, CT: "The decisions limit the equal opportunities for minorities, since they limit the affirmative action programs' employment goals for protected classes."

Albany, NY: "Once citizens consider laws challengeable they are less likely to accept or even see their morality. Affirmative action professionals have the responsibility of delivering programs which will assure minorities of equal opportunities....They must also assure this in a manner that inculcates acceptance and appreciation on the part of the non-minority populace. This is perhaps the foremost challenge. Court decisions like *Wards Cove* v. *AtonioTI and Martin* v. *Wilks* serve to undermine the benefits of affirmative action and certainly breed non-acceptance."

Lima, OH: "The Court's decisions raise doubts of legitimacy regarding the entire concept of affirmative action and, as such, create more of a negative stigma for local efforts."

Beaumont, TX: "The decisions indicate that the courts are minimizing the continual effects of discrimination. (They are) insensitive to the true reality of discrimination and suggest that affirmative action programs are not needed, when indeed they are needed."

CITIES INCLUDED IN THE REPORT:

Anchorage, AK; Birmingham, AL; Scottsdale, AZ; Brea, CA; Buena Park, CA; Carson, CA; Chino, CA; Claremont, CA; Compton, CA; Escondido, CA; Hawthorne, CA; Huntington Beach, CA; Inglewood, CA; Irvine, CA; Los Angeles, CA; National City, CA; Norwalk, CA; Oakland, CA; Ontario, CA; Riverside, CA; San Juan Capistrano, CA; Santa Monica, CA; West Covina, CA; Aurora, CO; Colorado Springs, CO; Denver, CO; Northglenn, CO; Bristol, CT; Danbury, CT; Middletown, CT; Stamford, CT; Waterbury, CT; Fort Myers, FL; Hialeah, FL; Jacksonville, FL; Lakeland, FL; Melbourne, FL; Metropolitan Dade County, FL; Orlando, FL; Pinellas Park, FL; Macon, GA; Savannah, GA; Boise, ID; Bolingbrook, IL; Decatur, IL; Dolton, IL; Elgin, IL; Highland Park, IL; Lansing, IL; Kankakee, IL; Macomb, IL; Normal, IL; North Chicago, IL; Urbana, IL; Elkhart, IN; Fort Wayne, IN; Hammond, IN; Indianapolis, IN; Kokomo, IN; South Bend, IN; Terre Haute, IN; Topeka, KS; Louisville, KY; Kenner, LA; Boston, MA; Brockton, MA; Cambridge, MA; Chicopee, MA; Everett, MA; Lawrence, MA; Lynn, MA; Malden, MA; Springfield, MA; Taunton, MA; Baltimore, MD; Frederick, MD; Portland, ME; Dearborn, MI; Highland Park, MI; Lansing, MI; Lincoln Park, MI; Madison Heights, MI; Oak Park, MI; Pontiac, MI; Rochester Hills, MI; Saginaw, MI; Brooklyn Center, MN; Minneapolis, MN; Rochester, MN; Saint Paul, MN; Kansas City, MO; Charleston, SC; Saint Louis, MO; Meridian, MS; Memphis, TN; Nashville, TN; Burlington, NC; Gastonia, NC; Wilmington, NC; Lincoln, NE; Omaha, NE; Irvington, NJ; Township of Parsippany-Troy Hills, NJ; Santa Fe, NM; Henderson, NV; Las Vegas, NV; Reno, NV; Sparks, NV; Albany, NY; Jamestown, NY; Mount Vernon, NY; New Rochelle, NY; Rochester, NY; Rockville Center, NY; Bedford Heights, OH; Cleveland, OH; Columbus, OH; Cuyahoga Falls, OH; Lima, OH; Maple Heights, OH; Shaker Heights, OH; Tulsa, OK; Portland, OR; Allentown, PA; Chester, PA; Williamsport, PA; York, PA; San Juan, PR; Warwick, RI; West Warwick, RI; Columbia, SC; North Charleston, SC; Rock Hill, SC; Memphis, TN; Nashville, TN; Amarillo, TX; Beaumont, TX; Dallas, TX; Denton, TX; Forth Worth, TX; Houston, TX; Port Arthur, TX; Salt Lake City, UT; Hampton, VA; Newport News, VA; Roanoke, VA; Bellingham, WA; Seattle, WA; Tacoma, WA; Green Bay, WI; Madison, WI; Wausau, WI; Parkersburg, WV; Cheyenne, WY.

Senator METZENBAUM. Mr. Abrams, we are happy to welcome you once again to testify before this committee.

Mr. ABRAMS. Thank you very much, Senator. I appreciate the opportunity to be here to testify in support of the Civil Rights Act of 1990.

Seated to my right is Peter Sherwood, the solicitor general of the State of New York, who is a specialist in these areas.

I, like many others, have watched with increasing concern the trend in the U.S. Supreme Court away from vigorous support of our laws that prohibit race, sex, and national-origin discrimination.

While the National Association of Attorneys General has not adopted a formal position on the bill that you are considering, I can assure you that these concerns are shared by many of my colleagues in other States, and most particularly by the Chair of the National Association of Attorneys General's Civil Rights Act Committee, Attorney General Bob Spire of Nebraska, who because of other obligations is unable to appear here today but who joins with me in these remarks.

It has only been 25 years since the Civil Rights Act of 1964 became effective. For most of those years, vigorous executive branch and private enforcement of antidiscrimination laws and the judiciary fealty to Congress' purposes in passing them combined to make dramatic changes to our social landscape that few anticipated a quarter of a century ago.

Despite the great strides that we have made, however, we are far from achieving our national goal of erasing the scourge of bigotry from our society.

General Spire and I, like many others, were dismayed last year by the U.S. Supreme Court's stunning retreat from the national commitment to eradicating employment discrimination.

It is not simply that decisions such as *Patterson*, *Wards Cove*, *Price Waterhouse*, *Wilks*, and *Lorance* turn the law in the wrong direction, they also threaten to extinguish trust in the legal system, built on three decades of slow but certain progress as a means to overcome the reign of Jim Crow in our social and political institutions.

I am especially concerned about the body blow that *Wards Cove* dealt to *Griggs* v. *Duke Power Company*, the U.S. Supreme Court's most important title VII decision. For nearly two decades *Griggs* has spurred reform of employment practices throughout our economy.

The court's unnecessary reformulation of the *Griggs* standard in *Wards Cove* dramatically alters a well-settled rule and presages years of turmoil and retrogression.

Griggs has benefited employers. A quarter of a century ago New York relied heavily on well-worn civil service selection procedures because they were inexpensive and they seemed objective merely because each candidate received a numerical score and was placed on a rank-ordered hiring list.

There was usually little evidence, however, that the tests used to make up these lists actually identified the best qualified candidates. Moreover, these arbitrary selection procedures excluded traditionally disfavored group from employment and advancement.

In 1973 a disparate impact suit was brought against our department in New York State, the Department of Correctional Services—that is the prison agency—because of exclusionary effects of its selection procedures at the rank of sergeant.

At that time, all 122 permanent sergeants were white. Under the 1973 examination, white candidates were likely to be promoted at almost seven times the rate of blacks, and Hispanics would be barred completely.

Because of requirements that *Griggs* imposed, the State devised a selection procedure that better served to identify those truly capable of performing the job and had less discriminatory effects on minorities.

Today, New York, like most other Government employers, devotes more resources to the development of job-related selection procedures. *Griggs* has been the catalyst that has brought about this salutary change in public sector employment.

Cases brought under the *Griggs* theory have also served to bring about racial and ethnic diversity in law enforcement. Congress and several presidential commissions have found that such diversity is essential to the reduction of citizen mistrust of our law enforcement agencies.

One such suit, brought in 1977 by the Department of Justice, spurred integration of New York's own State Police. Just last year the State superintendent testified that as a consequence of that integration, he said we are a better police force now than we were 10 years ago.

Wards Cove threatens to thwart the progress which *Griggs* and its progeny fostered. First, plaintiffs must now prove that the employer's selection procedures do not serve its business needs. An employer, however, is better situated to demonstrate that its screening device is essential to effective job performance, why the device was selected, and how it has served to select the best-qualified workers. Employers should continue to bear the burden of persuasion when their tests operate to exclude groups from job opportunities.

Second, the *Griggs* test requires an employer to demonstrate that its selection device is essential to effective job performance. That standard has proved to be workable in hundreds of cases, and it shouldn't be diluted, as *Wards Cove* has done.

Third, the *Wards Cove* requirement that the plaintiff must isolate the disparate effect of each of numerous questionable employment practices is also unfair. That burden should rest with the employer.

Sections 3 and 4 of S. 2104 would correct each of these flaws by reinstating *Griggs* as the proper standard in disparate impact cases. As attorneys charged with defending such cases for public employers, General Spire and I urge enactment of the bill before *Wards Cove* creates the damage that it threatens.

Certainly passage of the bill will preserve burdens that some employers would prefer to escape. But if those burdens are the cost of justice and progress, then they are well worth bearing. Therefore, I commend you, Mr. Chair, and other members of this committee who have been active supporters of this legislation.

Senator METZENBAUM. Thank you very much, Mr. Abrams.

[The joint prepared statement of Mr. Abrams and Mr. Spire follows:]

JOINT PREPARED STATEMENT OF ROBERT ABRAMS AND ROBERT SPIRE

Mr. Chairman and members of the committee:

Thank you for extending to me the privilege of testifying today in support of the Civil Rights Act of 1990.

I, like many others, have watched with increasing concern the trend in the Supreme Court away from vigorous support of our laws that prohibit race, sex and national origin discrimination. While the National Association of Attorneys General has not adopted a formal position on the bill you are considering, I can assure you that these concerns are shared by many of my colleagues in other states—most particularly by the chair of NAAG's Civil Rights Committee, Attorney General Robert Spire of Nebraska who, because of another obligation, is unable to appear here today but who joins with me in the remarks.

It has been only twenty-five years since the first great civil rights legislation of this century, the Civil Rights Act of 1964, became effective. For most of those years, vigorous executive branch and private enforcement of anti-discrimination laws and the judiciary's fealty to Congress' purposes in passing them combined to make dramatic changes to our social landscape few anticipated a quarter-century ago. In a generation's time, the Nation has done more to achieve quality of racial, religious, gender and ethnic opportunity on the job, in the classroom, in public facilities, in polling sites and elsewhere than any other country has ever attempted. We are, as a result, a far richer people.

No laws have contributed more to that progress than those which bar discrimination in employment, including Title VII, the centerpiece of the 1964 act. Despite the great strides we have made, however, we are far from achieving our national goal of eradicating discrimination from the workplace.

For most of the last thirty-five years, the Supreme Court has fostered the growing consensus that easing the courage of bigotry is a goal of the highest priority. Therefore, General Spire and I, like many others, were especially dismayed by the Court's stunning retreat from that national commitment in last year's employment discrimination decisions. It is not simply that decisions such as *Patterson, Wards Cove, Price Waterhouse, Wilks* and *Lorance* turn the law in the wrong direction; nor that these decisions, the product of a newly constituted, but bare, majority of the Court, create the impression that ours is a country of men, not of laws. Rather, they threaten to extinguish trust in the legal system, built on three decades of slow but certain progress, as a means to overcome the reign of Jim Crow in our social and political institutions.

But we have achieved a measure of consensus, as demonstrated by the bipartisan support the bill you are considering enjoys. I am here today to add my voice along with that of Robert Spire to the many who have announced support for S. 2104. And, we want to make it clear that we favor each of the provisions of the bill. In these remarks, however, I will focus my attention on the need for sections 3 and 4 of the bill, which are intended to redress the Supreme Court decision in *Wards Cove Packing Co. Inc.*, v. *Atonio*. I needn't describe the Court's ruling except to note that it dealt a bodyblow to the Supreme Court's unanimous 1971 decision in *Griggs* v. *Duke Power Co.*

It is not an exaggeration to say that *Griggs* is the single most important Supreme Court decision under Title VII. The standard it announced spurred reform of employment practices throughout our economy. Congress expressly endorsed *Griggs* in 1972 when it extended the protections of Title VII to state and municipal employees. The Court's unnecessary reformulation of the *Griggs* standard in *Wards Cove* has dramatically altered a well-settled rule and presages years of turmoil and retrogression.

My office, through my Civil Rights bureau, brings lawsuits to redress discriminatory employment practices, and I can assure you that *Wards Cove*, if it is not reversed, will greatly diminish our ability to prevail in disparate impact cases. We believe that the decision places unnecessary burdens on those who attempt affirmatively to enforce Title VII.

But, I am here today wearing another hat as well. One of my principal responsibilities as New York State's chief legal officer is to defend the state in its role as employer of over 200,000 people. I also head a department that employs over 1,500 of them. And, of course, I am a law enforcement official. From this vantage point, I can say that *Griggs* has benefited employers.

A quarter of a century ago, New York, like most government employer and many private employers, relied heavily on well-worn civil service selection procedure because they were inexpensive to administer and seemingly "objective," in the sense that each candidate who participated in the selection process obtained a numerical score which could then be placed on a rank-ordered "eligible list" from which employees could be hired or promoted. It mattered little that usually there was virtually no evidence that those who were placed higher on the list were better qualified for the job than others who obtained lower numerical scores. Moreover, those arbitrary selection procedure served as highly effective mechanism for excluding traditionally disfavored groups from employment and advancement.

Griggs forced employers to invest the time and effort to examine carefully those procedures to make sure that they indeed have a manifest relationship to the jobs for which they are being used and to consider use of alternative selection procedures which reduce or eliminated adverse impact. The result has been the development of selection procedures that better serve to identify those who are truly capable of performing the job.

In 1973, the New York State Department of Correctional Service was sued because of the exclusionary effects of its selection procedures at the rank of sergeant. At that time, all 122 permanent sergeants were white and the recently administered examination augured to continue the exclusionary effects of past procedures. The evidence revealed that white candidates were likely to be promoted at almost seven (7) times the rate of blacks and that Hispanics would be barred completely. Plaintiffs' theory in that case was based on *Griggs*. As a result of that litigation, the State took a hard look at our election procedure, and devised a new and greatly improved selection procedure that comported with Title VII and also produced less adverse impact.

Today, New York, like most other government employers, devotes more resources to the development of job-related selection procedures. *Griggs* has been the catalyst that has brought about this salutory change in public sector employment.

here is another dimension of the changes that have taken place since the passage of Title VII which should not be overlooked. That is the result of litigation brought against law enforcement agencies by the Civil Rights Division of the Department of Justice under Presidents Nixon, Ford and Carter. Those cases, brought on the theory of law embodied in *Griggs*, served to bring about racial and ethnic diversity in law enforcement. Congress and several presidential commissions have found that such diversity is essential to the reduction of citizen mistrust of our law enforcement agencies. The importance of building citizen trust as a critical ingredient of effective law enforcement is also discussed in several court decisions. The decision of the United States District Court for the Eastern District of Michigan in *Baker* v. *City of Detroit*, which is reported at 483 F. Supp. 930, dramatically describes this phenomenon.

We in New York have had similar experience as a consequence of the integration of our state police pursuant to a court order which the United State Department of Justice obtained in 1979.

In this regard, let me simply quote from an affidavit Thomas A. Constantine, our Superintendent of the Division of State Police and a 29 year veteran of the Division submitted to the court last year.

He said: "Over the years, the wisdom of increasing minority representation in the State Police has been proven time and time again. As a result of our hiring practices as governed by the Final Decree, increased minority representation within our ranks has been beneficial in variety of ways, including those cited by the Court as reasons for its issuance of the Decree. The Court's prophetic statement in its decision in 1979 has come true:

> In a democratic society, a police force that includes a reasonable proportion of members from the various group of people that it serves will have a better image with the public, will better be able to carry out its law enforcement functions, and will ensure full and fair utilization of human resources without regard to color of skin, origin of birth, or gender.

United States v. *State of New Yo rk*, 475 F. Supp. 1103, 1109 (NDNY 1979). We are a better police force now than we were ten years ago."

Wards Cove threatens to thwart the progress which *Griggs* and its progeny fostered. First, ignoring established precedent approved by Congress, and borrowing from inapt standards in disparate treatment cases, it places upon disparate impact plaintiffs the burden of proving that a selection device does not serve an employer's business needs. That departure from settled principles will benefit neither employers nor employees. An employer is better situated to demonstrate that its screening device is essential to effective job performance, why the device was

selected, and how it has served to aid in selection of the best qualified workers. Employers should continue to bear the burden of persuasion when their tests operate to exclude groups from job opportunities.

Second, *Wards Cove* dilutes the test for sustaining an exclusionary practice. Most have understood the *Griggs* test to require a demonstration that the practice is essential to effective job performance. That has proved to be a workable standard in hundreds of cases. *Wards Cove* has weakened that standard and now requires only a showing that the challenges practice serves in a significant way the legitimate goals of the employer. Only special solicitude for employers faced with the traditional test is offered as a justification for the new standard.

Third, when numerous questionable employment practices accompany observed disparities in the availability of job opportunities, *Wards Cove* requires the plaintiff to isolate and demonstrate the disparate effect of each one. Incredibly, that would require dismissing a plaintiff's suit where the employer has not maintained the records necessary to identify the discrete effect of each practice. The requirement goes well beyond what even the Justice Department urged in its brief *amicus curiae* in support of the *Wards Cove* employer, and it conflicts with the rule adopted by every circuit court of appeals that had addressed the issue. A sensible rule of fairness would continue to impose on the employer the burden of "disaggregating" the effects of facially-neutral screening devices.

Sections 3 and 4 of the bill would correct each of these flaws by reinstating *Griggs* as the proper standard in disparate impact cases. As attorneys charged with defending such cases for public employers, General Spire and I urge that the bill be enacted before *Wards Cove* creates the damage it threatens. Certainly, passage of the bill will preserve burdens that some employers would prefer to escape. But if those burdens are the cost of justice and progress, they are well worth bearing.

Senator METZENBAUM. Our next witness is Mr. William Burns, senior consultant with Pacific Gas and Electric in San Francisco.

You have certainly come a long distance, and I didn't mean to overlook you, sir.

Mr. BURNS. Thank you, Mr. Chairman. Good morning to you and to the other members of the committee.

I am testifying in support of sections 3 and 4 of S. 2104, which are intended to restore the standards that have developed over the last two decades as a result of *Griggs* and its progeny. I am employed by the Pacific Gas and Electric Company in the human resources department. My primary professional field is industrial psychology, and in that capacity I have actually conducted the research necessary to determine whether selection procedures are job-related under the *Griggs* standards, and have been involved in efforts at both the Federal and the State level in attempts to define these standards in employee selection guidelines.

I chaired the committee that wrote the California guidelines on employee selection procedures. I would like to begin by explaining why I believe that the *Griggs* standards are so important and also to discuss the ways that apparently neutral qualifications can in fact be discriminatory.

The key is whether or not they are valid qualifications. I would define not valid as a situation where the employee without the qualification is as capable in the performance of their jobs as are the employees who possess the qualification.

If, in addition to being not valid, a qualification is influenced by the present effects of past discrimination, then it serves as a vehicle for bringing our shameful past into the present. To proscribe present discrimination but to remain indifferent to the known effects of past discrimination seems hypocritical at best.

It is very important to understand the professional standards that defined the actions that are needed to determine business necessity, and this is something that, to my knowledge, has not yet come up in these hearings. During the two decades since *Griggs*, the courts have generally come to rely on professional standards to define what an employer must do if the selection procedure has an adverse impact

The language that the U.S. Supreme Court used in the *Griggs* decision ties their legal standard directly to professional standards. They say the touchstone is business necessity. But then they go on immediately to say if an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

In the field of psychological measurement, one of the key concepts is test validity, which in the employment context means exactly the same thing: That a test has been "shown to be related to job performance." Thus, the employer's responsibility to show business necessity is directly translated into the responsibility to use valid selection procedures.

This requirement is thoroughly and richly defined by three documents which, although they differ in detail, are highly consistent in their concepts and their general approach:

The first is the Uniform Guidelines on Employee Selection Procedures, adopted as final rules by four Federal agencies: EEOC, the Civil Service Commission, the Labor Department, and the Justice Department.

The second is the Standards for Educational and Psychological Testing, published by the American Psychological Association.

The third is the Principles for Validation and Use of Personnel Selection Procedures, published by the Society for Industrial and Organizational Psychology.

These documents describe the technology that an employer must use to show that a selection procedure is a valid qualification. There are no other acceptable technologies available.

I will discuss the employer's role under title VII in terms of responsibilities rather than burdens of showing production, persuasion, or anything else.

I do believe that if a selection procedure has an adverse impact, it is the employer's responsibility to demonstrate, using professional standards to the greatest extent possible, that the procedure represents a real and an important qualification.

In 1960, 5 years before title VII, the Pacific Gas and Electric Company established a policy that we would use only validated tests in our employment function. This policy was based on the conclusion that only in this way could we be fair to the applicants for our jobs. We wanted to be sure that our qualifications were real ones. What *Griggs* later required we imposed on ourselves for purely business-related reasons.

In addition to the fairness concern, we found that by using professional standards to study the requirements for our jobs, we received many important benefits:

One, our supervisors said that the people we were employing performed better on the job;

Two, we did studies that showed that we were saving a lot of money by using job-related selection procedures;

Three, valid qualifications are critical in an affirmative action program because the minimize the number of hires who can't do the job, and thus ensure the success of the program.

Along with the benefits come the responsibility to explain, justify, and defend any procedures that cause an adverse impact. Only the employer can fully understand and articulate all aspects of the selection process. The employer has all the information and is the designer and the user of the system.

It makes no sense to me to give the plaintiff the responsibility for showing that an employer's procedures are not job-related. Also, I am not sure whether such a showing is even possible.

I would like to quickly make a few other comments regarding the Civil Rights Act of 1990. The reporting services and the lawyers who advise business have all been saying that *Wards Cove* reversed *Griggs* and employers have much less to worry about. It is therefore irrelevant what the legal scholars say, since the word is out that the law has been changed.

Senator METZENBAUM. Can you wind up, please, Mr. Burns?

Mr. BURNS. Yes.

I would also like to comment briefly on the reactions that have been expressed by some critics to the word essential. In me they evoke a strong sense of deja vu. I can remember the same kinds of reactions to business necessity before it became clear that it was going to be defined using the professional standards that focus on job-relatedness.

Since these professional standards are the only technology that exists to evaluate selection procedures, they must also be used to determine whether a selection procedure is related to a characteristic that is "essential to effective job performance." Add to that the clear legislative intent to restore the standards and burdens that existed before *Wards Cove*, and I believe that there is little danger that absurd or onerous standards will develop.

I would guess that the word essential was introduced primarily to prevent attempts to defend selection procedures by showing a relationship with a minor, trivial, or tangential part of the job.

In short, I support the bill.

Senator METZENBAUM. Thank you, Mr. Burns. The executioner was just around the corner. [Laughter.]

[The prepared statement of Mr. Burns follows:]

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

It is an honor to accept the Committee's invitation to appear today. I am testifying in support of Sections 3 and 4 which are intended to restore the standards that have developed over the last two decades as a result of *Griggs* and its progeny.

I am employed by the Pacific Gas and Electric Co. as a Senior Consultant in the Human Resources Department. I have conducted the research needed to determine whether selection procedures are job-related under the *Griggs* standards and have been involved in efforts at both the State and Federal levels in the attempts to define these standards in employee selection guidelines. I chaired the Committee that wrote the California Guidelines on Employee Selection Procedures. I was appointed by Governor Reagan to review the state's personnel systems. I have testified as an expert witness in several Title VII cases.

How "Qualifications" can be Discriminatory.

I would like to begin by explaining why I believe that the *Griggs* standards are so important and also discuss the ways that apparently neutral qualifications can in fact be discriminatory. The key is whether or not they are valid qualifications. I would define *not* valid as a situation where the employees without the qualification are as capable in the performance of their jobs as are the employees who possess the qualification. If, in addition to being not valid, a qualification is influenced by the present effects of past discrimination then it serves as a vehicle for bringing our shameful past into the present. To proscribe present discrimination, but to remain indifferent to the known effects of past discrimination seems hypocritical at best.

The employer in *Griggs* set the effective date of its testing program as July 2, 1965 which was also the effective date of the Civil Rights Act of 1964. It can be inferred that they felt that the Tower Amendment to the Act which "protected" tests could be used as a loophole. The facts in the case confirmed that relatively few blacks in the employer's area of the rural South could pass the test. The result was a highly, though not perfectly, segregated workforce. The repair to the Act that the Court adopted was to give employers the responsibility to demonstrate that their qualifications are real qualifications and not merely plausible but irrelevant hurdles that only serve to impede the progress of Blacks toward full participation in our society. The results are the same in those cases in which an employer innocently establishes a qualification based on a strong belief that it is valid, but where it turns out not to be.

Professional Standards that Define Business Necessity.

During the two decades since *Griggs* the Courts have generally come to rely on the appropriate professional standards to define what an employer must do if a selection procedure has an adverse impact. The language that the Court used in the *Griggs* decision that ties their legal standard directly to professional standards is the following:

> "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."

In the field of psychological measurement one of the key concepts is "test validity" which in the employment context means that a test has been "shown to be related to job performance." Thus the employer's responsibility to show business necessity is directly translated into the responsibility to use valid selection procedures. This requirement is thoroughly and richly defined by three documents which, although they differ in detail, are highly consistent in their concepts and their general approach:

1. The Uniform Guidelines on Employee Selection Procedures (1978). Adopted as "final rules" by the EEOC, the then Civil Service Commission, the Department of Labor, and the Department of Justice.
2. The Standards for Educational and Psychological Testing (1985). Published by the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education.
3. The Principles for the Validation and Use of Personnel Selection Procedures (1987). Published by the Society for Industrial and Organizational Psychology.

These documents describe the technology that an employer must use to show that a selection procedure is a valid qualification. There are no other acceptable technologies available.

The Employer's Responsibility.

I shall discuss the employer's role under Title VII in terms of responsibilities rather than burdens of showing, production, or persuasion. I do believe that if a selection procedure has an adverse impact, it is the employer's responsibility to dem-

onstrate, using professional standards to the greatest extent possible, that the procedure represents a real and an important qualification.

In 1960 the Pacific Gas and Electric Co. established a policy that we would use only validated tests in our employment function. This policy was based on the conclusion that only in this way could we be fair to the applicants for our jobs. We wanted to be sure that our qualifications were real ones. What *Griggs* later required, we imposed on ourselves for purely business reasons. In addition to the fairness concern, we found that by using professional standards to study the requirements for our jobs, we received many important benefits:

1. Our supervisors said that the people we were employing performed better on the job than those who were hired before we were using job-related criteria.
2. Recent studies on the amount of money that our selection procedures were saving the Company showed some very significant returns on the money that we invested in our research. In fact some of the amounts were so high that we hesitated to use them because people didn't believe the results. These were in operator jobs where employee errors could cost millions of dollars.
3. Valid qualifications are critical in affirmative action efforts because they minimize the number of failures which in turn cause most of the opposition to the programs.

I believe and the Pacific Gas and Electric Co. believes that the professional standards that *Griggs* requires are in general advantageous to the Company.

Along with the benefits comes the responsibility to explain, justify, and defend any procedures that cause an adverse impact. Only the employer can fully understand and articulate all aspects of the selection process. The employer has all the information and is the designer and user of the system. It makes no sense to me to give the plaintiff the responsibility for showing that an employer's procedures are not job related. Also I'm not sure whether such a showing is even possible.

Other Comments on the Civil Rights Act of 1990.

1. I recommend that we concentrate no only on the legal points in the various cases and on the litigation technicalities but also that we pay close attention to the impact that *Griggs* has had on employers and on the ways that *Wards Cove* has changed that impact. Employers learned that ensuring that their employment tests were valid was necessary, was not as difficult as they had thought, and was beneficial in ways that they hadn't expected. Now many feel that they don't need to be concerned because they no longer have the burden of showing job-relatedness.

2. The reporting services and the lawyers who advise business have all been saying that *Wards Cove* reversed *Griggs* and that employers have much less to worry about. It is therefore irrelevant what the legal scholars say since the word is out that the law has been changed. Employers are now making their decisions based on what they have been told.

3. The objections to allowing a group of employment practices to be dealt with together seem unrealistic. It is common for employers to receive a resume or employment application, conduct an initial interview, refer the applicant to a manager for an interview, and then evaluate all the information at once. There is no way to determine the specific impact of each of these practices. They must be treated as a group.

4. It is almost never mentioned, but the *Griggs* standards that discourage inflated, unnecessary job qualifications also benefit any disadvantaged people including white males.

5. The reactions that have been expressed by some critics to the word "essential" evoke a strong sense of deja vu. I can remember the same kinds of reactions to "business necessity" before it became clear that it was going to be defined using the professional standards that focus on job relatedness. Since these standards are the only technology that exists to evaluate selection procedures, they must also be used to determine whether a selection practice is related to a characteristic that is "essential to effective job performance." Add to that the clear legislative intent to *restore* the standards and burdens that existed before *Wards Cove* and I believe that there is little danger that an absurd or onerous standard will develop. I would guess that the word "essential" was introduced primarily to prevent attempts to defend a selection procedure by showing a relationship with a minor part of a job.

6. In my view the combination of burdens, standards, and case law that was current prior to *Wards Cove* was working. Both plaintiffs and defendants were in general winning the cases that I felt that they should win. I think that what the Supreme Court did when they destroyed that balanced system is truly regrettable. I would hope that it can be put back together and can function again as well as it did before *Wards Cove*.

Questions Submitted by Senator Metzenbaum:

Question 1. You testified that employers would not be overly burdened by the "business necessity" defense, as defined in section 3 of the bill, because employers would rely on established professional employment standards, just as they had done so under *Griggs*±. Could you explain in greater detail:

a. how such standards were developed; b. who accepts and relies on the standards; c. how these standards work in practice; and d. how an employer would use these standards to meet the "business necessity" defense of *Griggs* and the "business necessity" defense in section 3 of the bill?

Answer. a. The standards have been developed over the last 70 years based on tens-of-thousands of studies and journal articles by professionals in the fields of psychological measurement and industrial and organizational psychology.

b. They are accepted and relied on by both the academicians and the applied practitioners in both of these fields and by those in related fields. The people in corporations who are responsible for ensuring that their employment selection procedures conform to the requirements of *Griggs* and its progeny also accept and rely on these standards.

c. The primary application of the standards is accomplished by conducting "validity studies" on "employee selection procedures" as described in the answer to Question 2 submitted by Senator Jeffords.

d. The stated purpose of the Act that is relevant to a "business necessity" defense is "to respond to the Supreme Court's recent decisions by restoring the civil rights protections that were dramatically limited by those decisions." The "civil rights protections" that existed are clearly those that are generally referred to as "*Griggs* and its progeny." It therefore seems inescapable that the definition of "business necessity" in section 3 of the bill is intended to restore the *Griggs* standard, nothing more and nothing less. If the section 3 "business necessity" definition is read in its proper historical context, it is identical to *Griggs* and therefore the use of professional standards would be identical under both defenses. They are used to conduct the validation studies which are then presented to show that the selection procedures are job-related in the ways that the professional standards require.

Question 2. You stated that your employer, Pacific Gas & Electric, along with other utility companies had developed test validity standards that applied across your industry.

a. Is is an approach other industries could adopt or is it limited to the utilities industry?

b. Is it possible to apply those standards across industries?

c. Will it be too burdensome for smaller employers to develop and rely on such standards?

Answer. a. Any industry or other group of employers with common jobs could adopt this approach. Cooperative studies of this type are specifically encouraged in Section 8 of the Uniform Guidelines on Employee Selection Procedures (1978), 29 CFR Part 1607.

b. Test validation studies can be done across industries if the jobs included are the same or nearly the same.

c. It is not feasible for small employers to conduct these studies individually. However most small employers are members of trade associations or other employer organizations of some kind. By contributing a relatively small amount of money, a small employer could become part of a large well-conducted study. Relying on the results will normally benefit the small employer financially.

Questions Submitted by Senator Jeffords:

Question 1. Your testimony that the adoption of job related criteria resulted in PG&E hiring employees who performed better on the job is of great interest. Does your experience in this regard relate solely to objective criteria and/or scored tests or does it also include subjective criteria?

Answer. All of our research which demonstrates the effectiveness and the value of job-related selection procedures has been done on objective procedures.

Question 2. What is involved in establishing the validation of a selection criterion (*i.e.*, what is the process that one must go through)?

a. Is this process substantially the same for both subjective and objective criteria?

b. If not the same, please succinctly explain the differences and any difficulties created in the validation process by these differences.

Answer. A typical validation study normally includes the following steps: (1) Choosing a specific group of employees who are all working in a particular job. (2) Evaluating their job performance from poor or mediocre on the low end to good or excellent on the high end. (3) Obtaining data on selection procedures such as test scores or other qualifications for each employee evaluated. (4) Correlating each employee's job performance evaluation with his or her "score" on the selection proce-

dure and then combining the results to see the overall pattern for the entire group. (5) Determining the amount and type of relationship shown and whether or not a claim that the selection procedure validly predicts job performance can be made.

a. In theory, the process is substantially the same, but there are practical problems that must be considered.

b. The key difference is that subjective procedures are not "standardized" in the way that tests are. Tests present the same questions to each candidate and they use the same time limits and scoring procedures so that the scores achieved by different people can be directly compared with each other. In unstructured interviews, different interviewers ask different questions and they follow-up in different ways. Thus they obtain different information so that they may come to different conclusions. This limits what psychometricians call "reliability" which in turn limits the validity which can be demonstrated.

Question 3. In your experience, can a "group of practices" be validated in those circumstances where it is either impractical or impossible to separate the component parts for this purpose? Please provide details and examples in support of your answer.

Answer. In theory a "group of practices" that could not be separated would be validated as a single procedure in the same way that a group of questions is validated as a single total score on a test. In my experience, I have never been in a situation where I could not find a way to separate the data into the component parts.

Senator METZENBAUM. Senator Dan Coats is with us. He has to be absent for another meeting, but I know that he would like to say a word, particularly because we have with us the mayor of Indianapolis.

Senator Coats.

Senator COATS. Thank you, Mr. Chairman.

Mr. Mayor, I apologize for not being here to hear your testimony. I was testifying myself downstairs one floor, before Senator Levin's committee, and the questions took longer than I had anticipated. So I am sorry. But I have your testimony here and will read it very, very carefully.

I want to welcome you to this committee and state to you how important your testimony is before the committee.

The mayor, Mr. Chairman, not only has, as he says, filled every pothole in Indianapolis, he has set an example in Indianapolis for the kinds of nondiscriminatory employment that I think sets a model and an example for many cities across the country, and he represents the Conference of Mayors here in a very important and distinguished way.

Mr. Mayor, we thank you very much for your contributions.

Senator Dole has called a meeting for Midwest State Senators on the Clean Air Act at 10:30 a.m., which I have to excuse myself for, and I am sorry that I must rush in and rush out. But we thank you for your testimony.

Mr. HUDNUT. Thank you, Senator.

Senator METZENBAUM. Senator, I hope that the high regard which you have for Mayor Hudnut will cause you to read his testimony very carefully, particularly prior to your casting a vote in connection with this very important legislation. [Laughter.]

We need your vote.

Senator COATS. I saw that setup coming, Mr. Chairman. [Laughter.]

I am going to take it with me and read every word.

Thank you, Mr. Chairman.

Senator METZENBAUM. Thank you very much.

Mr. Paras, we almost got to you before. We are happy to have you here with us to speaking in behalf of the U.S. Chamber of Commerce.

Mr. PARAS. Thank you, Senator.

While I appear here on behalf of the U.S. Chamber, I would like the committee to know that for over 30 years my practice has been exclusively in the area of employment law, and I have the honor of being a member of the governing council of the Labor and Employment Law Section of the American Bar Association.

Of particular concern is the effort to overturn the U.S. Supreme Court's *Wards Cove* decision, of which there already has been much discussion. That decision, in my view, has mistakenly been portrayed in some of the press, and certainly by some of the supporters of the bill, as a major reversal of the U.S. Supreme Court's historic vigilance in the protection of civil rights. As our written presentation will demonstrate, that charge is simply unfounded.

Wards Cove is neither remarkable nor revolutionary in its application of adverse impact analysis. Indeed, it is fully consistent with both Congress' intent in enacting title VII and with the U.S. Supreme Court's prior adverse impact decisions.

Specifically, it has never been the intent of this Congress or the U.S. Supreme Court to sweep away employment selection criteria that were adopted without any discriminatory intent and that reasonably measure an employee's ability to perform the job.

The sponsors of this bill, however, claim it is not enough that an employment factor be both reasonable and uniformly applied. Instead they claim that only some small core of yet-unidentified and perhaps unidentifiable selection standards which ultimately will be found by the courts to be "essential to business success" should be permitted.

This proposed search for the least common denominator of employment flatly contradicts Congress' concern in the enactment of title VII that it not interfere with the employer's right to set high standards for their employees provided only that the standards are job-related.

This concern was valid in 1964 and is even more valid today as America struggles to compete effectively in the world market.

Simply stated, this bill would have the effect of forcing employers to adopt quotas in both hiring and advancement of employees if they are to avoid costly litigation and significant liability.

The sponsors of the bill claim this will not cause employers to adopt quota systems. But how can that be? Under this bill the only evidence an employee will need to bring an employer into court will be the fact that the employer's workforce is not numerically proportional. The employee will not have to produce any evidence of discriminatory intent. The employee will not have to identify any specific practices allegedly causing that imbalance.

No, the employee would only have to establish the absence of numerical proportionality. The rest of the burden of proof will lie entirely with the employer. How is the employer to meet this burden? Employers may be able to establish that evaluations by supervisors are accurate predictors of job success, and employers may be able to establish that personnel interviews are reasonable selection devices.

Employers may be able to establish the reliability of a broad number of selection factors, but such job-relatedness will no longer be sufficient to avoid liability. Instead the employer will have to prove that each of its practices as well as the total combination of factors affecting its employment decisions are indispensable or, in the words of the proposed legislation, "essential to effective job performance."

We are aware of no employer who has ever been required to, much less been able to, meet such an onerous burden of proof.

So, what choice remains for employers? The answer is as obvious as the intent of the bill: To avoid unending and costly litigation and the vast expanded potential for liability presented by this bill, employers will be required to select and to advance employees by race and by sex. The goal of a sex- and color-blind society will have been abandoned, and our country will be the poorer for it.

The misguided notion that appears to underlie much of this bill is the conclusion that title VII is not working well. There, however, is no empirical basis for this assumption. On the contrary, anyone with even rudimentary knowledge of the changes title VII has wrought in the American workplace knows that title VII has been and continues to be a powerful and successful vehicle for the eradication of employment discrimination.

In light of the history of the progress and achievement, it seems that the prime and perhaps only beneficiaries of the bill would be the lawyers who would reap potentially vast monetary rewards from expanded incentives for litigation which the bill provides.

Most importantly, the changes to title VII sought in this bill offend the basic premise of equality upon which our democratic and constitutional society is founded. Although the substitution of quotas for merit can never be justified, it is particularly inappropriate in this time of intense and growing international competition.

The touchstone of any national legislation to be passed by this or any Congress should be the removal, not the creation, of artificial barriers to merit-based employment.

Thank you, sir.

Senator METZENBAUM. Thank you very much, Mr. Paras.

[The prepared statement of Mr. Paras follows:]

PREPARED STATEMENT OF JAMES C. PARAS

Good morning. My name is James C. Paras. I am a Senior Partner in the San Francisco law firm of Morrison and Foerster and a member and past Chairman of the U.S. Chamber of Commerce's Labor Relations Committee. I am also a member of the governing Council of the Labor and Employment Law Section of the American Bar Association. Accompanying me today is Nancy Reed Fulco, Human Resources Attorney for the Chamber. Thank you for affording the Chamber this opportunity to discuss the impact of the proposed civil rights legislation on the business community

Since the passage of Title VII of the Civil Rights Act of 1964, this country has made tremendous sides both in eradicating employment discrimination and in eliminating artificial barriers to employment while at the same time protecting an employer's right to make reasonable and nondiscriminatory employment decisions. However, proponents of S. 2104, the Civil Rights Act of 1990, claim that the Supreme Court has recently made "an abrupt and unfortunate departure from its historic vigilance in protecting civil rights." 136 *Cong. Rec.* S. 1018 (Feb. 7, 1990). Based upon this assumption, S. 2104 is offered to overrule numerous Supreme Court decisions handed down over the past decade. With few exceptions, proponents contend

that the bill would merely restore prior law and, therefore, presumably have little impact on employers who already have been striving to comply with existing employment discrimination laws.

From the perspective of the business community, nothing could be further from the truth S. 2104 represents a multifaceted revision and expansion of the employment discrimination laws that have developed over the past 25 years. If enacted, it would dramatically alter the balance between the goal of eliminating discrimination in society and the goal of preserving a vital and efficient business environment capable of competing in an increasingly global economy. This is so because S. 2104 would substantially increase the burdens and risk of liability for every employer in this country, including the most exemplary.

The most troubling aspects of the proposed legislation include the bill's adoption of a virtually irrebuttable presumption in favor of a quota system; penalization even of those employers who successfully prevent impermissible factors from affecting the outcome of employment decisions; substantial and often open-ended expansion of the time for raising discrimination complaints by some employees, while ironically shortening the time for raising such complaints by other similarly situated employees; injection of unpredictable and perhaps uncontrollable elements of damages in employment discrimination cases; and reduction of incentives for discrimination claimants to settle their cases and restore work relationships. In the section-by-section analysis that follows, these problems with S. 2104 will be addressed.

I. ANALYSIS

A. *SECTION 4: ADVERSE IMPACT ANALYSIS*

One of the principal thrusts of S. 2104 is to overturn the Supreme Court's decision in *Wards Cove Packing Co.* v. *Atonio*, 109 S. Ct. 2115 (1989), and in the process substantially to rewrite the adverse impact analysis utilized by the Supreme Court for the past two decades. Contrary to the impression created by its title, Section 4 of the bill would not "restore" any preexisting Supreme Court interpretation of Title VII. Instead, this Section would legislatively overrule not only the *Wards Cove* decision but also a number of other Supreme Court decisions, including the Courts's seminal decision in *Griggs* v. *Duke Power Co.* 401 U.S. 424 (1971). By shifting the burden to the employer to prove, in the absence of quotas, that it did *not* discriminate and that the factors utilized in its employment process were not only reasonable but also indispensable, S. 2104 would leave employers with little choice but to adopt quota systems in order to protect themselves from substantial liability.

1. Title VII Currently Preserves an Employer's Right to Establish Selection Criteria with a Potentially Adverse Effect on Protected Groups Provided the Selection Criteria Are Job-Related.

At the outset it should be noted that Congress never intended title VII to force employers to abandon reasonable predictors of job success that have been adopted without the taint of discriminatory intent. Instead, as the Supreme Court's development of the disparate treatment and adverse impact models of proof establishes, only practices that are intentionally discriminatory or that create obstacles to equal employment that are not reasonably related to job performance are prohibited by Title VII.

In *Griggs* itself, a unanimous Supreme Court observed that there had been substantial concern prior to the adoption of Title VII regarding whether the new law could be construed to require employers to select employees based upon their protected status, rather than their employment qualifications. To allay this fear, "Proponents of Title VII sought throughout the debate to assure the critics that the Act would have *no* effect on *job-related* tests." *Griggs*, 401 U.S. at 434 (emphasis added). Consistent with Congressional intent, Senator Case of New Jersey and Senator Clark of Pennsylvania, co-managers of the Senate bill, issued an influential memorandum explaining that Title VII, as written, "expressly protects the employer's right to insist that any prospective applicant . . . must meet the applicable job qualifications." 110 *Cong. Rec.* S. 7247. In a separate memorandum, these Senators further stated that "There is no requirement in Title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. *An employer may set his qualifications as high as he likes.* . . .", *Id.* at S. 7213 (emphasis added). From these statements, the *Griggs* court concluded that selection criteria are permissible despite their adverse impact on protected groups if they are "demonstrably a *reasonable* measure of job performance." *Griggs*, 401 U.S. at 430 (emphasis added).

As the Court's subsequent decision in *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978), reflects sound jurisprudential and societal reasons support Congress's original intent not to interfere with an employer's right to rely upon legiti-

mate job-related selection criteria In *Furnco*, plaintiffs challenged an employer's reliance upon personal and outside recommendations concerning applicants' job qualifications. The Court of Appeals ruled in favor of the plaintiffs and ordered the employer to implement a new hiring process based upon an evaluation of written employment applications. In reversing this decision the Supreme Court noted "[t]he dangers of embarking on a course such as that chartered by the Court of Appeals here, where the court requires businesses to adopt what it perceives to be the 'best' hiring procedures. . .... Not only does the record not reveal that the court's suggested hiring procedure would work satisfactorily, but also there is nothing in the record to indicate that it would be any less 'haphazard, arbitrary, and subjective' than *Furnco's* method. . . . Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it." *Id.* at 578.

2. Section 4 of the Bill, Rather than *Wards Cove*, Is Inconsistent with Prior Adverse Impact Decisions of the Supreme Court.

Two principal theories of proof under title VII are "disparate treatment" and adverse impact." Under the disparate treatment theory, an employer is liable if it intentional treated a member of a protected group less favorably than other persons because of the former's protected status. *Texas Department of Community Affairs* v. *Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). Under the adverse impact theory, an employer need not have possessed any discriminatory intent. Instead, the employer is liable if it utilized "artificial arbitrary, and unnecessary barriers to employment" that had a disproportionately adverse impact upon members of a protected group. *Griggs*, 401 U.S. at 431. In the words of the *Grigds* court, such unreasonable employment criteria could not be allowed to become the "masters of reality." *Id.* at 433.

Prior to 1988, each Supreme Court case adverse impact decision had involved "standardized employment tests or criteria" *Watson* v. *Fort Worth Bank and Trust*, 108 S. Ct. 2777, 2785 (1988). In *Watson*, the Supreme Court broadly expanded the scope of adverse impact analysis to encompass not only standardized or objective employment factors but also nonstandardized or subjective factors as well. This means that every aspect of the employment decision making process, whether articulated or unarticulated, can now be examined under the adverse impact theory.

Wards Cove Packing Co. v. *Atonio*, 109 S. Ct. 2115 (1989), is the first Supreme Court case to examine the adverse impact analysis following the expansion of that analysis in *Watson*. In *Wards Cove*, the Court summarized the adverse impact analysis as follows: First, the plaintiff must identify the specific employment practices that the plaintiff contends are discriminatory and establish that, in fact, each challenged practice adversely impacts members of a protected group. *Id.* at 2124–25. Second, in the event that the plaintiff establishes that certain practices have such an adverse impact, the employer must produce evidence that each of the challenged practices "serves, in a significant way, the legitimate employment goals of the employer. [Citations omitted.] The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice . . .". *Id.* at 2125–26. Finally, once the employer has introduced evidence of reasonable business justifications for the challenged practices, the plaintiff must come forward with evidence of alternative practices that could equally serve the employer's legitimate interests with a lesser adverse impact on protected employees. *Id.* at 2126–27. The burden for establishing that the employer is relying upon nonjob-related practices remains on the plaintiff.

The tripartite analysis followed in *Wards Cove* is entirely consistent with prior Supreme Court precedent. With respect to the plaintiff's prima facie case, there is simply no dispute that plaintiffs have been required to identify and establish the adverse impact of specific employment practices in each Supreme Court adverse impact case preceding *Wards Cove*. *See e.g., Griggs*, 401 U.S. 424 (high school diploma and aptitude test requirements); *Albermarle Paper*, 422 U.S. 405 (aptitude tests); *Washinton* v. *Davis*, 426 U.S. 229 (1976) (written tests); *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977) (height and weight requirements); *New York City Transit Authority* v. *Beazer*, 440 U.S. 568 (1979) (drug use policy); *Connecticut* v. *Teal* 457 U.S. 140 (written test); *Watson*, 108 S. Ct. 2777 (subjective promotion evaluations). Similarly, in *Teal*, the Supreme Court rejected "bottom line" analysis and required adverse impact analysis to be applied separately to each aspect of an employment process. *Teal* 457 U.S. 440.

With respect to a defendant's rebuttal obligation, the Supreme Court likewise has consistently held that an employer must show that its practices are, in fact, "job-related" or possess a "manifest relationship" to the employment in question. *Wards Cove*, 109 S. Ct. at 2130 n.14 (Stevens, J. dissenting) (quoting *Teal, Beazer, Dothard,*

Albermarle Paper, and *Griggs*.) This is true even in cases such as *Griggs* which used the alternative formulation "business necessity." In elaborating upon the meaning of business necessity in *Griggs*, the Court immediately explained that "If an employment practice which operates to exclude [a member of a protected group] cannot be shown to be related to job performance, the practice is prohibited." *Griggs*, 401 at 431. Nowhere in *Griggs* did the Supreme Court say that a challenged practice had to be essential, indispensable, or otherwise absolutely required in order for a business to function.

An issue not expressly resolved in *Griggs* and subsequent Supreme Court decisions is the precise degree of proof required by a defendant at the rebuttal stage. Although the Supreme Court had used words such as "demonstrating," "proving," or "showing" to describe the defendant's rebuttal obligation, it had never discussed whether this was a burden of production or persuasion. In *Wards Cove*, the Supreme Court concluded that the defendant carried a burden of producing evidence of its "job-relatedness" defense, but that the plaintiff retained the burden of proving that the defendant had, in fact, relied on arbitrary or unreasonable practices that adversely affected a protected group. This is entirely consistent with the Court's resolution of the same issue in the context of disparate treatment analysis. *Burdine*, 450 U.S. 248. Moreover, it would seem anomalous to impose a higher burden of proof upon defendants in cases involving alleged unintentional discrimination than in cases involving alleged intentional discrimination.

Finally, if a defendant has identified legitimate job-related reasons for its employment practices, it has always been the plaintiff's burden to identify and establish that alternative practices could equally serve the defendant's interests with a lesser impact upon protected groups. *See, e.g., McDonnell Douglas*, 411 U.S. at 801; *Albermarle Paper*, 422 U.S. at 425.

Section 4, in combination with the definitions found in Section 3 of the bill would substantially alter the adverse impact analysis developed by the Supreme Court since the early 1970's in several major respects.

First, it would relieve the plaintiff of the requirement of challenging specific employment practices. Instead, it would permit the plaintiff to rely exclusively on "bottom line" statistics indicating an overall imbalance in the work force. In the absence of any further evidence, the plaintiff may prevail based upon such bottom line statistics alone. This conflicts not only with the Supreme Court's *Teal* decision but also with Section 703(j) of Title VII, which expressly states that employers are not required to maintain numerical balances or grant preferential treatment to eliminate numerical imbalances.

Second, Section 4 would raise the standard of justification for challenged business practices from its current "reasonable measure of job performance" standard to one requiring evidence that the practices are not only reasonable but also "essential to effective job performance. This elevation of the degree of justification required from businesses squarely conflicts with prior Supreme Court decisions, which have held that manifestly job-related selection criteria do not have to be essential or absolutely required in order to be sustained. Davis, 426 U.S. at ——, Beazer, *440 U.S. at ——. In addition, it runs directly into the problem identified in Furnco* of requiring courts to assume the difficult, indeed impossible, burden of ascertaining what hypothetical practices would be essential to a given business.

Third, by placing the burden of persuasion upon defendants to establish the necessity or indispensability of their business practices, Section 4 would relieve the plaintiff, indeed even the court, of determining whether there are any alternative practices that would have a lesser impact on minority groups. Instead, Section 4 would impose upon the defendant the burden of establishing that there is no possible alternative to the way its business is operated that might lessen the adverse impact upon protected groups.

In this regard, it is interesting that proponents of S. 2104 attempt to justify its shifting of the burden of proof to the employer by observing the virtual impossibility of proving a negative fact, i.e., the absence of any conceivable business justification for a challenged practice. As the foregoing indicates, *Wards Cove* never imposed such an obligation on a plaintiff. A plaintiff's only obligation under *Wards Cove* and its predecessors was to meet the specific job-relatedness justifications proffered by the defendant in its rebuttal. This is consistent with the purposes underlying both disparate treatment and adverse impact analysis, which is the orderly and focused presentation of evidence. *Cf. U.S. Postal Service Board of Governors* v. *Aikens*, 460 U.S. 711 (1983) (disparate treatment model "is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination"). *Id.* at 715 (quoting *Furnco*, 438 U.S. at 577). In contrast, under Section 4, a defendant could no longer satisfy its rebuttal obligation by estab-

lishing that the practices in question are, in fact, reasonably related to legitimate job expectations. Instead, the defendant will carry the much higher, and in many cases impossible, burden of having to establish that no conceivable alternative practices could be adopted that would be equally effective in accomplishing the defendant's business goals.

3. Section 4 Will Inevitably Lead to the Adoption of Quotas by Employers

There is no question that Title VII, as currently written, does not require employers to adopt quota systems. Indeed, Section 703(.i) of Title VII expressly states that employers are not required and logically cannot be penalized for failing to adopt quotas or preferences of members of protected groups. This has led the Supreme Court to avoid the adoption of legal rules "leaving any class of employers with 'little choice' but to adopt such measures." *Watson*. 108 S. Ct. at 2788 (quoting *Albermarle Paper*, 422 U.S. at 449 (Blackmun, J. concurring)).

Consistent with past Congressional intent, the sponsors of S. 2104 belie any interest in imposing quota systems through the language of Section 4. This denial, however, is unconvincing

When the *Watson* Court expanded adverse impact analysis to every aspect of employment, not just discrete and objective selection criteria, it expressed an obvious and common sense concern that "the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures," such as quotas. *Watson*, 108 S. Ct. at 2787. The articulation of adverse impact analysis in *Wards Cove* was carefully designed to ensure that this concern did not come to fruition.

Section 4, on the other hand, places business planners in the dilemma of having to choose between quotas and the legal requirement of proving that each and every aspect of the employment process, in addition to the overall process itself, is not only reasonable and manifestly related to bona fide job requirements but is also essential or indispensable. The sponsors of S. 2104 give no explanation of how this latter standard can be met, much less any evidence that it can ever be met. Nor is there any legal precedent explaining how an employer can that common employment practices, e.g., relying on job recommendations, or supervisory evaluations, or the overall employment process itself, are essential.± Thus, at a minimum, employers without an effective quota system in place would face unpredictable and extremely risky prospects of litigation.

Effective business planning requires reasonably accurate predictions about the legal effect of employment decisions. The legal uncertainties implicit in the defense burden imposed by Section 4 would deprive businesses of the ability to make such predictions concerning the likelihood of establishing a business necessity defense. Accordingly, the most reasonable alternative for many businesses would be the adoption of quotas. Even this, of course, would not provide absolute protection, because employees harmed by the quotas may also be able to prevail in a reverse discrimination lawsuit. Thus, Section 4 truly represents a "no win" proposition for employers.

B. *SECTION 5: MIXED MOTIVATION*

Section 5 of the bill nominally is offered to overturn the Supreme Court's decision in Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989). In Price Waterhouse, the Supreme Court addressed the standards applicable to "mixed motive" cases, i.e., cases in which legal and illegal factors allegedly entered into an employment decision. The plaintiff had asserted that proof of an impermissible factor playing any part in the employment process resulted in a finding of liability against the employer, regardless of whether the impermissible factor affected the outcome of the employment decision in question. The defendant, on the other hand, claimed that the plaintiff must prove that the impermissible factor actually altered that decision.

The court selected a middle ground between the positions advocated by either party. First, the Court held that a plaintiff establishes a prima facie case by showing that an impermissible factor entered into the decision making process. *Id.* at 1785–86. Thereafter, a defendant can avoid liability only by proving that the impermissible factor did not alter the ultimate decision. This requires the defendant to prove by a preponderance of evidence that legitimate, nondiscriminatory reasons would have led to the same result in the absence of the prohibited factor. *Id.*1 at 1786–88.

Justice O'Connor's concurring opinion explored more fully an issue left unanswered by Justice Brennan's plurality decision. This issue involved the importance that impermissible factors must have played in the decision process. *Id.* at 1790–91 and n.13. Justice O'Connor concluded that a plaintiff, at least, must establish that the impermissible factor played a "substantial" role in the deliberative process before the employer is burdened with the requirement of proving that permissible

factors dictated the same result. As Justice O'Connor noted, this requirement is supported by the consensus of circuit courts that have addressed this issue, which had uniformly required proof that discriminatory factors "played a significant or substantial role in the contested employment decision" before shifting the burden of proof to the defendant. *Id.* at 1804 (quoting the Court of Appeals; decision below in *Hopkins* v. *Price Waterhouse*, 825 F.2 458, 470 (D.C. Cir. 1987)).

Section 5 of the bill differs from *Price Waterhouse* in two principal ways. First, its use of the term "motivating factor" appears to conflict with the requirement that the alleged impermissible factor must have been a substantial or significant factor in the employment process. Thus, a plaintiff can establish a prima facie case by showing that the impermissible factor played a role in the minds of any person involved in the decisional process, no matter how insignificant that role may be. There is simply no reason to shift the burden of proof to the employer based on trivial or insubstantial evidence.

Second, Section 5 goes substantially beyond the position of Justice Brennan and his colleagues in Price Waterhouse. As noted above, Justice Brennan's plurality decision permitted the defendant to absolve itself of any liability if it could carry the substantial burden of proving that the prohibited factor did not alter the ultimate decision. As written, Section 5 only allows the defendant to reduce its financial exposure with proof that the impermissible motive had no actual effect on the employment decision in question. The defendant would still be found liable for employment discrimination and required to pay the plaintiff's legal fees no matter how strong its evidence that the plaintiff was not denied any employment opportunity for a prohibited reason.

This latter result of Section 5 is a dramatic alteration of title VII. As originally enacted, it was clear that Title VII only prohibited discriminatory actions, not thoughts. As Justice O'Connor observed, in response to claims that Title VII would become a "thought control bill," the influential Senator Case stated that "There must be some specific eternal act, more than a mental act. Only if he does the act because of the grounds stated in the bill would there be any legal consequences." 100 Con. Rec. S. 7254 (1964). Section 5 would impose a finding of liability and attorneys' fees upon employers even in the absence of a finding that any employment decision was brought about by illegal motivation.

Finally, from a business perspective, businesses cannot control the thoughts of each and every employee involved in the decision making process. The best an employer can do is to establish an employment process that, through an effective system of checks and balances prevents decisions from being made for illegal reasons. If an employer is successful in this endeavor, it should be rewarded, not penalized, by the law.

C. *SECTION 7: STATUTE OF LIMITATIONS*

Although advertised as a response to *Lorance* v. *AT&T Technologies*, 109 S. Ct. 2261 (1989), Section 7 of the bill represents a major rewrite of Title VII by allowing a charge to be filed at any time within two years of the time an unlawful practice occurred "or has been applied to affect adversely the person aggrieved, whichever is later." Under current law, charges must be filed within 180 days after an employee receives notice of an unlawful employment practice. *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980). Sections 7(a)(1) and (a)(2) of the bill would dramatically extend Title VII's statute of limitations, without any justification. Section 7(a)(1) would extend the time limits for filing a charge from 180 days to two years. Section 7(a)(2) would extend that time limit even further by starting the running of the limitations period at the time that the adverse action impacts the employee, rather than the time that the employee has notice of the adverse action. In essence, Section 7(a)(2) would overrule *Delaware State College* v. *Ricks*.

There is no basis for this dramatic extension of title VII's time limits. A primary goal of Title VII is the *prompt* resolution of employment discrimination claims. This goal not only advances the potential for reconciliation and the reestablishment of a nondiscriminatory work relationship but also diminishes the chance of harm to innocent coemployees, whose career and other expectations are often built on prior employment decisions. Permitting an employee to wait for more than two years before filing a charge of discrimination is wholly inconsistent with the goal of prompt resolution of employment disputes. Moreover, it is simply unfair to permit an employee to wait to exercise a right while the memories of witnesses fade, documents are lost or misplaced, and back pay is accruing. An individual should not be permitted to "grow" potential back pay award while the employer goes without notice of any problem, in the workplace. If employers are given prompt notice of a problem by the early filing of a charge, they can correct it and provide reasonable compensation to any victims of discrimination. Without prompt notice, the problem

may go uncorrected, and an employer's back pay liability will be increased unjustifiably. Moreover, by unnecessarily expanding an employer's back pay liability, this extended limitations period may well impede another fundamental purpose of Title VII-conciliation and settlement of cases.

Title VII's 180-day limitations period has served both employers and employees well for over 25 years. The same 180-day rule applies under the National Labor Relations Act and has succeeded in protecting employee rights under that Act for more than 50 years. We are aware of no public outcry or need for a change in Title VII's statute of limitations and fail to see any benefit from this dramatic and unwise change.

D. *SECTION 8: REMEDIES*

Although the sponsors of this bill claim that it represents merely a "technical restoration of the law and an attempt to fill "gaps" in the law, in fact Section 8 constitutes a wholesale revision of Title VII's enforcement provisions by providing for jury trials as well as awards of both compensatory and punitive damages. The rationale for this radical change is to "make the remedies available for sex, religion and ethnic discrimination claims under Title VII the same as the remedies now available under Section 1981 for racial discrimination." This ill-conceived attempt to alter dramatically the Title VII landscape should be rejected.

There is no good reason why the remedies available under Title VII should mirror the remedies available under Section 1981. Indeed, the opposite is true—there are good reason why the remedies should differ. Section 1981 is not coextensive in its coverage with Title VII. Section 1981 covers only racial discrimination and is applicable to an employers; while Title VII establishes a coordinated mechanism for remedying employment discrimination. Unlike Section 1981, Title VII offers victims of discrimination assistance in investigating their claims, competent counsel to represent them, and a waiver of court costs. This comprehensive scheme is designed to facilitate prompt resolution of employment disputes, with an emphasis on conciliation and settlement. Section 1981, on the other hand, merely provides a private right of action, without any administrative support mechanism. These differences underlie the distinction between the remedies available. Indeed, it was on the basis of these differences that a unanimous Supreme Court first recognized the availability of compensatory and punitive damages in Section 1981 actions. *Johnson* v. *Railway Express*, 421 U.S. 460 (1975). As the court noted "the remedies available under Title VII and under Section 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent." *Id.* at 454.

Rather than effectuating the purposes of the Title VII, the availability of compensatory and punitive damages will undermine the Act's goals by impeding the prompt resolution of employment disputes through conciliation and settlement. The availability of compensatory and punitive damages will provide an irresistible incentive to litigate. Employees are unlikely to accept reasonable pretrial settlement offers if they know that there is a possibility that they will be awarded a windfall in the form of punitive damages if they go to trial. This is particularly true under Title VII because the system contains no incentives for the employee to accept a reasonable settlement offer—the employee pays neither court costs nor attorneys' fees while the Equal Employment Opportunity Commission handles the charge. Claims are not likely to be settled where there is such a significant "upside" and no corresponding "downside" to litigating.

Recent experience in California has shown that the availability of compensatory and punitive damages turns employment litigation into a high-stakes lottery in which everyone—employees, employers, and the courts—loses. Once compensatory and punitive damages became available in California, wrongful discharge litigation went out of control. The courts were overwhelmed with cases, and juries seemed to lose touch with reality. Between 1980–1986, employees won more than 70 percent of the cases tried before juries, and the average award was more than $645,000.[1] Million-dollar verdicts to single plaintiffs were not uncommon, and one verdict in Santa Clara County exceeded $50 million. *Haun* v. *NEC*, Case No. —— (1986). Punitive damages comprised a big part of these awards. The average punitive damage award was over $520,000. *Rand Study* at p. 25; *see also Stemming the Tide* at p. 406 (the average punitive damages award in 1982–1986 was $494,000). In recognition of the problems that these irrational verdicts created, the California Supreme Court recently determined that compensatory and punitive damages should not be recovered in most wrongful discharge cases. *Foley* v. *Interactive Data*, 47 Cal. 3d 654 (1988).

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[1] J. Dertouzos, "Legal and Economic Consequences of Wrongful Termination," Rand Corporation Study R-3602-ICJ (1988) ("Rand Study"); Gould, "Stemming the Wrongful Discharge Tide: A Case for Arbitration, 13 Emp. Rel. L.J. 404 (1988) ("Stemming the Tide").

A major problem with punitive damages is the lack of any guidance to juries as to when and in what amounts punitive damages should be awarded. As Professor Gould noted, "juries in these cases often impose liability and large damage awards according to their own standards of fairness rather than the legal instructions provided by the judge." *Stemming the Tide* at p. 406. This creates not only great uncertainties for business planners but also great inequities between successful plaintiffs who may receive widely varied awards based on similar conduct and harm. The standard articulated in the bill do little to resolve this concern. Although the bill's standard tracks the standard articulated by the Supreme Court in *Smith* v. *Wade*, 461 U.S. 30 (1983), it provides little guidance to courts or juries as to when punitive damages should be awarded. Indeed, because the bill adopts a "reckless disregard of the rights of others" standard, and because intentional discrimination necessarily involves a disregard of others' rights, punitive damages would seem to be available in virtually every case involving intentional discrimination. Surely, the sponsors of the bill did not intend this result.

Compensatory and punitive damages are simply a bad idea in Title VII litigation. By producing unreasonably large verdicts, they will increase the costs of goods and services, make the market less efficient, and reduce the availability of jobs. They will encourage employers to retain incompetent employees for fear of litigation, thereby making the work force as a whole less productive. These are real weighty concerns. As the Foley court recently noted, "the expansion of tort remedies in the employment context has potentially enormous consequences for the stability of the business community." 47 Cal. 3d at 669.

Moreover, punitive damages are at odds with a fundamental premise of Title VII—that victims of discrimination be compensated for the injuries that they actually suffer. Punitive damages are a windfall to plaintiffs, who are entitled to receive full compensation for their injuries, but nothing more. Title VII currently provides victims of discrimination with adequate compensation for their injuries and, thus, punitive damages are not necessary to fill any "gap."

The proponents of compensatory and punitive damages argue that the availability of these remedies will have a desirable deterrent effect. However, given the skyrocketing costs of employment litigation, no further deterrent is necessary. Experience has shown that the average cost of defending a single plaintiff employment discrimination action through trial can be between $100,000 and $150,000, and often it is much more. Of course, the employer must also pay the employee's attorneys' fees and costs if the employee prevails. Thus, an employer who discriminates is facing at least $200,000–$300,000 in litigation costs alone. This is more than ample deterrence for any employer.

Finally, we note that this issue has recently been debated by the Senate in the context of the Americans With Disabilities Act (ADA). For many of the reasons articulated above, Congress determined that compensatory and punitive damages were not appropriate in the employment discrimination context. Indeed, Senator Durenberger explained the elimination of the compensatory and punitive damages provision from the ADA as follows:

[W]e also took great effort to address the concerns many had over the punitive nature of the remedies section. Instead of allowing punitive and compensatory damages as originally introduced, the bill before us today parallels current civil rights legislation under title II and VII of the Civil Rights Act of 1964 . . . This change will help avoid some of the excessive and unnecessary litigation the original bill would have caused. (Emphasis added).

Vol. 135 Con. Rec. No. 112, S. 10721 (Sept. 7, 1989) (Statement of Senator Durenberger). This approach was fully debated and rejected last fall, and there is no reason to reopen that issue here.

E. *SECTION 9: ATTORNEYS FEES*

We have serious concerns about the bill's attorneys' fees provisions. First, Section 9 of the bill will have a dramatic effect on settlement offers under Rule 68 of the Federal Rules of Civil Procedure. Rule 68 provides that if a timely pretrial offer of settlement is not accepted and "the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." The purpose of Rule 68 is to encourage voluntary settlements and relieve overcrowded court dockets by creating a disincentive to unreasonable rejections of fair settlement offers.

In *Marek* v. *Chesny*, 473 U.S. 1(1984), the Supreme Court held that a party who rejects a Rule 68 settlement offer and thereafter is awarded less than the offered amount at trial cannot recover either fees or costs for any post offer work, where the statute authorizing recovery of attorneys' fees defines attorneys' fees as part of the "costs." Title VII currently defines attorneys' fees as part of the costs. 42 U.S.C.

2000e–5(k). By striking out the phrase "as part of the" from Title VII's costs provisions, Section 9(3) makes recovery of attorneys' fees independent of the recovery of costs. This change apparently is intended to permit Title VII to circumvent the holding of *Marek* v. *Chesny*. Thus, if Section 9 is enacted, title VII plaintiffs will be free to reject Rule 68 settlement offers without any fear of the loss of attorneys' fees should they not recover more than the offered amount at trial.

This attempt to reduce the risk of rejection of a reasonable settlement offer is both misguided and contrary to the purposes of Title VII. As previously noted, one of the fundamental goals of title VII is the prompt resolution of employment disputes through conciliation and settlement. Section 9 undercuts this goal by making rejection of reasonable settlement offers risk-free to Title VII plaintiffs. It will also result in unnecessary, costly litigation. An individual should not be permitted to recover attorneys' fees and costs for work performed after rejection of a settlement offer where he does not recover more than the offered amount at trial. Under these circumstances, the settlement offer would have fully compensated the individual for his losses and should have been accepted. Nor should defendants be required to pay attorneys' fees to plaintiffs on amounts expended to prosecute post-offer claims because such claims are, by definition, worthless. Thus, the changes proposed by Section 9 are unwise and unwarranted and should be rejected.

The Chamber also has serious concerns about Section 9(4). Section 9(4) of the bill would foreclose court approval of Title VII's settlements unless "a waiver of all or substantially an attorneys' fees was not compelled as a condition of settlement." The bill's sponsors argue that this section is intended to overrule *Evans* v. *Jeff D.*, 475 U.S. 717 (1986), and that it would simply bar "forced" waivers of attorneys' fees claims in consent decree settlements. But the language of Section 9(4) goes far beyond that modest objective and should, in any event, be rejected.

There is no good reason to overrule *Evans* v. *Jeff D.* Contrary to the impression created by the rhetoric supporting Section 9(4), *Evans* v. *Jeff D.* does not mandate "forced waivers" of attorneys' fees claims. In *Evans* v. *Jeff D.*, the Supreme Court merely held that a District Court has the power to approve a consent decree settlement that includes a waiver of attorneys' fees. Thus, *Evans* v. *Jeff D.* does. not stand for the proposition that parties to a title VII must waive their attorneys' fees; rather, it holds only that they may waive those claims. Thus, plaintiffs and their counsel remain free to reject any settlement offer they deem unreasonable. In addition, they may address limitations on the waiver of fees or the ultimate allocation of settlement proceeds in the event of such a waiver in their retainer agreements.

This is a sound, reasonable result. There is no good reason for parties to Title VII litigation to be foreclosed from waiving attorneys' fees claims as part of the negotiated settlement. To the contrary, there are many good reasons for parties to be permitted to, and perhaps encouraged to, waive fees claims during settlement negotiations. For many Title VII actions, particularly those seeking injunctive relief, the attorneys' fees awards are the largest monetary exposure facing defendants. Obviously, to the extent that plaintiffs are permitted to waive all or part of those claims, Title VII actions will be more easily settled. Indeed, foreclosing any waiver of attorneys' fees would often pose an absolute barrier to settlement. In *Evans* v. *Jeff D.*, the court recognized these problems and reached the correct result. We have heard no public outcry against that decision and fail to see why it should be reversed. Indeed, we note that the Attorneys General in more than 42 states, three protectorates, and one major city filed amicus briefs *supporting* the result reached by the court in *Evans* v. *Jeff D.* That decision is correct and should be permitted to stand.

Moreover, although the bill's sponsors suggest that Section 9(4) is limited to court ordered consent decrees, the language of Section 9(4) is not narrowly drawn. Section 9(4) refers to a "consent order or judgment." As drafted, it could easily be read to apply to the settlement of any title VII claim. For obvious reasons, this result would be folly. Experience has shown that attorneys' fees awards in single plaintiff title VII actions often dwarf the amounts recovered by plaintiffs. H. Newburg, *Attorney Fee Awards*, ch. 11 (1986). Given this large exposure, few defendants would be willing to settle single plaintiff cases unless they could obtain a waiver of any attorneys' fees claims. Thus, by foreclosing settlement of fee issues as part of a package settlement, Section 9(4) would greatly impede settlement of single plaintiff Title VII cases. The bill's sponsors surely cannot intend this result.

II. *CONCLUSION*

The sponsors of S. 2104 avidly assert that their bill is intended to overturn a number of recent Supreme Court decisions and restore the law to its prior state. As the previous discussion demonstrates, however, this bill would go much further. Indeed, S. 2104 represents a blatant effort to inject concepts into the law that are directly in conflict with the principles upon which Title VII was founded, including,

most importantly, the principle of basing employment decisions on merit and merit alone. This effort to alter the fundamental precepts of Title VII law, as articulated by Congress and the Supreme Court since 1964, threatens to make numerical quotas the very artificial "masters of reality" originally condemned in the *Griggs* decision.

The misguided notion that appears to underlie much of the bill is the conclusion that Title VII is not working well. However, there is no empirical basis for this assumption. Moreover, anyone with even rudimentary knowledge of the changes that Title VII has wrought in the American workplace knows that Title VII has been and continues to be a powerful vehicle for the eradication of employment discrimination. In light of this history of progress, it seems that the prime beneficiaries of the bill would be the lawyers who would reap potentially vast monetary rewards from the expanded incentives for litigation that the bill provides.

Most importantly, the changes to Title VII sought in this bill offend the basic premise of equality upon which our democratic and constitutional society is founded. Although the substitution of quotas for merit can never be justified, it is particularly inappropriate in this time of intense and growing international competition. The touchstone of any national legislation to be passed by this or any ensuing Congress should be the removal, not the creation, of artificial barriers to merit based on employment.

The U.S. Chamber of Commerce is the world's largest federation of business companies and association and is the principal spokesman for the American business community. It represents nearly 180,000 businesses and organizations, such as local/state chambers of commerce and trade/professional associations

More than 93 percent of the Chamber's members are small business firms with fewer than 100 employees, 45 percent with fewer than 10 employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business—manufacturing, retailing, services, construction, wholesaling, and finance—numbers more than 10,000 members. Yet no one group constitutes as much as 32 percent of the total membership. Further, the Chamber has substantial membership in all 50 states.

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the 59 American Chambers of Commerce Abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities.

The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross section of its members serving on committees, subcommittees and task forces. Currently, some 1,800 business people participate in this process.

QUESTIONS FROM SENATOR HATCH

QUESTION NO. 1: Suppose that 20 percent of the plumbers in a labor market are members of a particular racial or ethnic group. Suppose further that only 10 percent of the plumbers in a plumbing company in that labor market are members of that same group. How would Sections 3 and 4 of S. 2104 apply to this hypothetical?

RESPONSE: Under Section 4 of S. 2104, a complaining party would be able to establish a disparate impact claim merely by showing that a "group of employment practices resulted in a disparate impact." This major change in Title VII law would permit complaining parties to challenge employers' overall utilization statistics, without challenging any particular employment practice. The hypothetical in your question illustrates the problems caused by this approach.

Under proposed Section 4, a minority plumber could sue the plumbing company based solely upon the plumbing company's failure to achieve statistical parity in its workforce, i.e., its failure to fill 20 percent of its positions with members of the minority group in question. The minority plumber would merely have to allege that the statistical disparity results from the plumbing company's overall employment process. The minority plumber would not have to establish his or her own employment qualifications, would not have to identify any specific practice of the company, and would not have to show how any such practice contributed to the underlying statistical disparity.

Instead, Section 4 would place the burden solely upon the plumbing company to sort out all possible factors, whether internal or external to the employer, affecting its employment process. Thereafter, the company would have to prove which factors were not causally related to the overall statistical imbalance and would have to prove the absolute necessity of any factors that it could not prove were unrelated to its utilization statistics. Faced with the difficulties of meeting this as yet untested evidentiary standard, the plumbing company would have little choice but to adopt a quota that gives preferences to members of the minority group.

QUESTION NO. 2: If S. 2104 becomes law, do you believe any competent plaintiff's lawyer will ever allege, in a Title VII disparate impact case, that a specific employment practice causes disparate impact?

RESPONSE: We can see no reason why a competent attorney would identify any specific employment practices under the revised disparate impact analysis proposed in Section 4. As noted in our response to the preceding question, a plaintiff could establish a disparate impact claim solely by relying upon the bottom line statistics regarding an employer's overall utilization rates. Given this minimal evidentiary standard, no competent attorney would gratuitously assume a higher burden of proof, i.e., that of identifying specific employment practices utilized by the employer.

QUESTION NO. 3: In your view, under S. 2104, what would happen to the requirement that a plaintiff must show causation between the practices he or she complains about and the disparate impact?

RESPONSE: The shift from an analysis of specific and identifiable employment practices to an analysis of the results of an employers' overall employment process would remove the burden of establishing causation from a plaintiff's case. In *Wards Cove Packing Co.* v. *Atonio*, 109 S. Ct. 2115 (1989), the Supreme Court reiterated the plaintiff's longstanding burden of identifying and establishing the causal relationship between a specific employment practice and an alleged statistical imbalance in an employer's workforce. *Id.* at 2124–25. The inclusion of the term "group of employment practices" in Section 4 was clearly intended to overturn this aspect of the *Wards Cove* decision. This removal of a causation requirement from a complaining party's burden of proof is, to our knowledge, without precedent in American law.

QUESTION NO. 4: Please set forth the disparate impact cases decided by the Supreme Court and whether they have all involved specific identified practices.

RESPONSE: The answer to this question is found in the Supreme Court's decision in *Watson* v. *Fort Worth Bank and Trust*, 108 S. Ct. 2777 (1988). As Justice O'Connor noted, "Each of our subsequent decision . . . like *Griggs* itself, involved standardized employment tests or criteria. *See, e.g., Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 95 S. Ct. 2362, 45 L. Ed. 280 (1975) (written aptitude tests); *Washington* v. *Davis*, [426 U.S. 229 (1976)] (written test of verbal skills); *Dothard* v. *Rawlinson*, 433 U.S. 321, 97 S. Ct. 2720, 53 L. Ed 786 (1977) (height and weight requirements); *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 99 S. Ct. 1355, 59 L. Ed. 587 (1979) (rule against employing drug addicts); *Connecticut* v. *Teal*, 457 U.S. 440, 102 S. Ct. 2525 (1982) (written examination)." *Watson*, 108 S. Ct. at 2785; *see also Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) (high school diploma requirement and aptitude tests); *Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977) (seniority and leave policies). Indeed, prior to *Watson*, only specific and objective selection criteria were subjected to disparate impact analysis. *Watson*, 108 S. Ct. at 2785. In extending disparate impact analysis to encompass discretionary or subjective factors, as well as objective factors, the Supreme Court noted that such an extension could be harmonized with Congress' longstanding opposition to race or sex based quotas only by imposing the requirements of identification and proving causation upon the complaining party. *Id.* at 2787–89.

QUESTION NO. 5: Isn't a claim that an employer's entire set of employment practices are illegal one that should be heard as an intent case?

RESPONSE: An affirmative answer to this question is compelled by the discussion contained in our responses to the preceding four questions. As noted above, removing the requirement that a complaining party challenge *specific* employment practices and produce evidence indicating some *causal relationship* between the challenged practices and the employer's utilization rates, permits the complaining party to rely entirely upon the employer's bottom line statistics. This would have the ironic and undesirable effect of holding employers liable for *unintentional* actions based on *less* evidence than is required to prove *intentional* discrimination. No justification can exist for penalizing employers who have acted with no discriminatory motives more readily than employers who have deliberately discriminated against protected group members. Yet that is precisely what Sections 3 and 4 will accomplish. We believe the law should continue, as it has in the past, to use statistics re-

garding overall utilization solely as evidence of intentional discrimination, not as an independent basis for liability against employers. *See, e.g., Teamsters* v. *United States*, 431 U.S. 324 (1977) (statistics may properly be used as evidence of intentional discrimination).

QUESTION NO. 6: If the burden of persuasion in a Title VII disparate impact case is shifted to the employer to make out what amounts to an affirmative defense, will that change Title VII in any fundamental way?

RESPONSE: Most certainly. Under the Supreme Court's disparate treatment and disparate impact analyses, plaintiffs have had to show that an employer *intentionally discriminating* against members of a protected group or arbitrarily adopted employment criteria that unintentionally impede such individuals' employment prospects. In the absence of such proof, employers have been free to manage their workforce in the most effective way possible.

Under Sections 3 and 4 of S. 2104, employers will no longer be free to adopt the most effective methods of conducting their business. Instead, they will be required to water down employment standards to the minimal level necessary to remain in business because of the inherent difficulty in proving that any higher standards are not only reasonable, but "essential". Even then, they may not be able to escape liability since, as Justice O'Connor noted, it is "unrealistic to suppose that employers can eliminate or discover and explain the myriad of innocent causes that may lead to statistical imbalances. . . ." *Watson*, 108 S. Ct. at 2787. Faced with these bleak alternatives, employers may have no choice but to adopt quota systems.

QUESTION NO. 7: Are there going to be any practical difficulties in conducting Title VII litigation wherein the plaintiff alleges both claims of disparate treatment and disparate impact, especially if jury trials are added to Title VII intent cases?

RESPONSE: The answer is affirmative. As the testimony concerning this Bill itself illustrates, Title VII law has evolved into a highly sophisticated and often complex system for assessing the evidence in a given case. This evolution includes the development of the disparate treatment and disparate impact theories of liability. These theories envision a multistep analytic process involving not only shifting burdens of proof, but different types of burdens of proof, i.e., the burden of production versus the burden of persuasion. The theories further require distinctions between intentional and unintentional discrimination and between individual and class actions. Finally, the evidence itself often involves competing statistical theories or conclusions of expert witness. As a result, even judges with years of legal training sometimes struggle with the proper application of these competing legal theories. The likelihood that juries will adequately understand and properly apply these complicated methods of analysis is minimal, at best.

QUESTION NO. 8: You testified that S. 2104 will lead to increased and prolonged litigation. Please list all of the provisions which cause this effect and explain how they will do so.

RESPONSE: Three portions of the Bill threaten to increase and prolong litigation. First, the relaxation of the burden of proving disparate impact in Sections 3 and 4 will give an incentive to the filing of more lawsuits, especially class action lawsuits. Under current law, an individual possessing few, if any, of the skills an employer customarily and consistently seeks has little incentive to pursue a claim. Under the Bill, however, such an individual would have a new incentive to litigate, regardless of his or her own lack of qualifications. Indeed, assuming only that an employer's workforce lacks statistical parity, an unqualified individual will have a special incentive to file a class action in which the importance of the individual's own lack of qualifications will be minimized. By shifting the focus from individual merit to numerical balance, the Bill invites an expansion of current litigation.

Second, the addition of unlimited compensatory and punitive damages in Section 8 of the Bill will increase the incentive to litigate and diminish the ability of the Equal Employment Opportunity Commission or employers to settle litigation on a reasonable basis. This is especially true with respect to settlements involving job reinstatement or similar relief. When the value of a lawsuit far exceeds the value of the position originally at issue, rational plaintiffs would be disinclined to settle.

Third, the addition of jury trials in Section 8 would lengthen and complicate the conduct of discrimination trials. Any experienced litigator or judge will agree that jury trials are more difficult to manage and more time consuming than court trials. They introduce new elements such as voir dire, jury instructions, jury deliberations, and potential mistrials, that are lacking in court trials. They also burden the courts already crowded dockets because of the need to arrange numerous consecutive trial dates in order to accommodate the increased vagaries of jury trials.

QUESTION NO. 9: What impact does Section 13 of S. 2104 have on your concern that this bill will lead to quota hiring by employers?

RESPONSE: None. Although Section 13 purports to leave the law governing affirmative action unchanged, it does not expressly mention either quotas or the role of statistics under Sections 3 and 4 of the Bill. Moreover, the general language of Section 13 of the Bill can not be expected to override the specific provisions in Sections 3 and 4 of the Bill, which permit liability to be established based upon statistical imbalance alone. Under traditional rules of statutory construction, courts confronted with potentially conflicting statutory provisions are bound to follow the more specific provision.

Senator METZENBAUM. Professor Paul Andrisani, Temple University, we are happy to have you with us, and we certainly will get you out of here in plenty of time.

I just might ask you, Professor, are you speaking on behalf of yourself or on behalf of any particular constituency?

Mr. ANDRISANI. No. I am only speaking on behalf of myself, Senator.

Senator METZENBAUM. Please proceed.

Mr. ANDRISANI. Thank you, Senator, for allowing me to speak this morning.

I would like to say that I am not a lawyer, I am not here to speak on behalf of this bill or against this bill. I will leave that to others and to legal scholars. I am a labor market researcher. I have studied labor markets for 20 years, and I am here today to speak about two issues that deal with the situation, the employment situation of women and minorities, that concerns me and I think that should be considered in drafting legislation that deals with the labor market situation of women and minorities.

The first point I would like to make is a point about factors that affect the labor market situation and women and minorities. And one, of course, is labor market discrimination. I think every competent and reasonable expert and student of labor markets is aware of the importance and the reality of labor market discrimination, and laws are needed. Laws should be improved to eradicate labor market discrimination against women and minorities wherever it exists.

But there are other factors as well that also explain and account for the labor market situation of women and minorities aside from employment discrimination by employers, and these shouldn't be forgotten. One of the most important, of course, as a professor I realize and I think almost everyone realizes, the importance of education, education at all levels. Disparities in dropout rates from high school among the States vary considerably from a low of 9 percent dropout rates in some States to as high as 40 percent in others and almost 44 percent in the District of Columbia.

College attendance and major fields of study differ between whites and blacks, males and females, and this also has an effect on earnings and employment situations of women and minorities.

One study which we did at Temple University that I think is particularly important is a study of why young black males who we know are disproportionately not in college to the extent that they were before, why that is so. What we found is that young black males signing up for the military give as one of the most important reasons for signing up for the military: College benefits. And yet, when they leave the military, we find so many of them never use their college benefits and return to school.

These are important concerns, I think.

Another is the preferences or various types of work that may differ between males and females and perhaps whites and blacks because of limitations of labor market information and societal discrimination that occurs outside the labor market that can restrict opportunities of women and minorities.

The second point that I would like to discuss is what is the use or the misuse of statistics in employment discrimination cases. With respect to this issue, it is my opinion that a disparity between the percentage of minorities or women employed in a specific occupation in the workforce in a certain geographic area and the percentage employed in that same occupation with a specific employer in that area, my point is that that disparity should be treated very carefully and further researched before one concludes that the disparity constitutes conclusive evidence of race or sex discrimination by that particular employer.

There are a number of reasons for this:

First, 20 years of research on labor markets have convinced me that labor market phenomena defy facile generalizations;

Second, the percentage of minorities or women employed in a specific occupation in an area is only an imperfect estimate of the availability of qualified women or minorities available and interested in any real sense for employment with any specific employer, and should be treated as such;

Third, there are often serious questions about the appropriate geographic scope of the relevant labor market. For example, whether a labor market area is an entire city, its suburbs, or something larger or smaller should be considered.

And this is an important point because labor market statistics often exist in census data that will tell you about the proportion of blacks and the proportion of females that are available in that entire labor market area, and while that may be an accurate assessment for that entire area, that doesn't necessarily mean that it is an appropriate assessment for every part of that labor market area. There can be, for example, charitable institutions and hospitals which are in ethnic neighborhoods which are in a particular suburb of a city at one end of a city and pockets of minority applicants might be entirely at another end, in a suburb entirely opposite, and the ability to get from one part of the town to another could be a serious concern. The availability figures in census data wouldn't really tell you how many were available for that particular charitable institution. If employers are small employers, it could be owned by women or minorities, or they're employers that are low-wage employers. Will they attract people from throughout the entire area? Facile acceptance of statistics would be, I think, a very big mistake.

There may also be serious concern about the appropriate definition of an occupation itself. For example, many bookkeepers call themselves accountants in census data and therefore in no real sense are qualified for accountant positions with any prestigious public accounting firm.

Such data errors may cause the availability for an occupation to be artificially inflated. Many specific occupations have no data published for them at all by the Census Bureau concerning the availability of minorities or women in them within many areas of the

country. Instead, reliable census data are only available for very broad occupational groups for many parts of the country, permitting only very imprecise comparisons of labor market availability and employer utilization in specific occupations.

Another point is, where such disparities exist there must be concern for whether they represent disparities in recruiting, hiring, promotions, terminations, for instance, or some other employer policy, and whether they represent patterns that occurred during any legally relevant time period or earlier.

For all of these reasons, Senator, I think that before statistics are accepted in a willy-nilly manner, that they must be researched and understood very carefully.

Thank you.

[The prepared statement of Mr. Andrisani follows:]

PREPARED STATEMENT OF PAUL J. ANDRISANI, PH.D.

I, Paul J. Andrisani, am Academic Associate Dean of the School of Business and Management at Temple University in Philadelphia. I am also Director of the Center for Labor and Human Resource Studies and a Professor of Human Resource Management at Temple University. For the past 19 years I have specialized in studying the unique employment problems of those groups that have historically encountered special labor market disadvantages: namely, minorities, women, older worker, youths, veterans, and the disabled. My doctoral dissertation focused on discrimination in employment.

My research has been funded by grants and contracts from the U.S. Department of Labor, the National Commission for Employment Policy, the U.S. Administration on Aging, the Social Science Research Council, the U.S. Department of the Army, the Human Resource Research organization, and the Equal Employment Opportunity Commission. My studies have appeared in numerous academic journals and books, and have been presented at national and international meetings of professional societies such as the American Economics Association, the Econometrics Society of America, the Academy of Management, the Industrial Relations Research Association, the American Sociological Association, the American Psychological Association, and the Gerontological Society of America.

I have also consulted in nearly 100 employment discrimination cases over the pat 13 years, testifying for both plaintiffs and defendants a an expert on labor market economics and statistics and human resource management in both federal and state courts. My testimony has been on issues of liability, damages, and mitigation of damages. A detailed listing of my research, publications, and consulting is attached as part of my curriculum vitae.

I have been asked by Mark Disler of the Senate Labor Committee to briefly discuss two issues: (1) the economic thinking on the subject of race and sex discrimination in employment and (2) whether a discrepancy between the percentage of minorities or women employed in the labor market in a specific occupation and the percentage employed in that same occupation with a specific employer constitutes race or sex discrimination by that employer.

With respect to the first point, race and sex discrimination by employers generally occurs through unequal pay for equal work, through unequal access to the better paying jobs, or through both. To some, pay differences and occupational differences between whites and minorities, men and women, are per se evidence of discrimination in employment. However, profit motives by employers and the stimulus to lower costs to meet competitive prices make it costly for employers to discriminate against capable blacks or women, even if they preferred to hire and promote only white males. This is because employers who prefer to hire or promote only white males are to some degree precluded or at least limited from doing so by their competitors who might reap a cost advantage by hiring and promoting cheaper minorities and women. They will also be precluded or limited in the future by the limited supply of white males who will be entering the labor force in the coming years.

Should the cost advantage to competitors who hired and promoted minorities and women be appreciable, those competitors could sell their product at a lower price in an effort to gain a larger market share and greater profits, thereby forcing employers who discriminate to cease doing so or to accept a reduction in profits—possibly

even a loss if they failed to take advantage of the cheaper minority and female labor supply.

Thus, difference in earnings and occupational assignments between whites and minorities, males and females, do not necessarily reflect discrimination by employers, since competition in labor and product markets tends to erode discriminatory preferences by employers. Rather race and sex differences in earnings and occupational distributions also reflect the differences between whites and minorities, males *and females, in productive kills,* qualifications, work experience, and preferences for various types of work. These differences are generally caused by two sets of forces: (1) those outside the labor market, e.g., "societal discrimination" prior to initial entry into the work force, and (2) discrimination by prior employees altering the work experience that women and minorities bring with them to a new employer.

For example, inequality in educational opportunity may lead to whites and males being better trained and differently trained for the world of work, on average, than minorities or females upon initial entry into the work force. Furthermore, parents and other role models in more prestigious occupations provide important sources of labor market information that can help develop youths' interests in qualifying for such positions themselves eventually. More limited access to such role models and information can hamper the motivation of minority and female youths to strive to qualify for such occupations themselves.

Still further, subsequent to entry into the work force, employment discrimination by "prior employers" can lead to lower levels of skills and qualifications among minorities and women that hamper their ability to be hired, their initial assignments when hired, their starting salaries, and their upward mobility after being hired by employers who do not discriminate. Thus, while there of course is discrimination in the labor market, not all of the differences between the races and sexes in occupational attainment and earnings reflect current employment discrimination by the current employers of minorities and women. Rather, there is still a tremendous need for concern about the education and training of minorities and females that may hamper their ability to compete on an equal footing with whites and males in the labor market.

With respect to the second issue, even a statistically significant disparity between the percentage of minorities or women employed in a specific occupation in the work force in a certain geographic area and the percentage employed in that same occupation with a specific employer in that area should be treated carefully and further researched before one concludes that such a disparity constitutes conclusive evidence of race or sex discrimination by that employer. There are a number of reasons. First, 20 years of research on labor markets have convinced me that labor market phenomena defy facile generalizations.

Second, the percentage of minorities or women employed in a specific occupation in an area is only an imperfect "estimate" of the availability of qualified women or minorities available and interested in any real sense for employment with any specific employer, and should be treated as such. Third, there are often serious questions about the appropriate geographic scope of the relevant labor market—e.g., whether an entire city and its suburbs or something larger or smaller should be considered.

Fourth, there may also be serious concern about the appropriate definition of an occupation itself. For example, many "bookkeepers" call themselves "accountants" and therefore in no real sense are qualified for accountant positions with any prestigious public accounting firm. Such data errors may cause the availability for an occupation to be artificially inflated. Furthermore, many specific occupations have no data published for them at all concerning the availability of minorities or women in them within many areas of the country. Instead, reliable census data are only available for very broad occupational groups for many parts of the country, permitting only very imprecise comparisons of labor market availability and employer utilization in specific occupations.

Fifth, where such disparities exist, there must be concern for whether they represent disparities in recruiting, hiring, promotions, or terminations, for instance, and whether they represent patterns that occurred during any legally relevant time period. One final concern about too quickly jumping to conclusions about disparities in such statistics is a very real worry that employers will simply treat whatever availability numbers ultimately emerge as quotas. If so, they may simply find it easier to reverse discriminate by putting enough women and minorities in whatever positions are necessary so as to reduce their "exposure." This may be the case as much for minority and female owned businesses as for any other business, if the economic exigencies are such that it is cheaper to revere discriminate than to explain the "business necessity" of having too few minorities or women in a court of

law. My experience in the human resource management field suggests to me that this will be a very real possibility and alternative to many employers.

Finally, the economic costs of reverse discrimination to society, the economy, firms and individuals will be worrisome, but the human costs to minorities and women as well as to white males will be even more worrisome. Minorities and women who qualify and achieve in the labor market should neither be hindered by employment discrimination that holds them back from their rightful place or hindered by reverse discrimination that denies them their justly earned feelings of pride and accomplishment from making it on the basis of their merits. For minorities and women to be made to feel that they succeeded for some reason other than their merits, in a very real way, will deny them and others the American Dream. While equal employment opportunity is both desirable and essential in a competitive economy, merely comparing simplistic labor market statistics in very naive ways is no way to accomplish such an important goal.

Question from Senator Hatch: Suppose that 20 percent of the plumbers in a labor market are members of a particular racial or ethnic group. Suppose further that only 10 percent of the plumbers in a plumbing company in that labor market are members of that group. Could you describe if there are factors other than discrimination that might account for this disparity and discuss those factors.

Response from Professor Paul J. Andisani: There are factors other than employment discrimination by the employer in question which might account for such a hypothetical disparity. First, the disparity might be due to "chance." That is, if you flipped a fair coin 10 times you would expect to get 5 heads and 5 tails, but you certainly would not get that every time you flipped the fair coin 10 times. Often you would get something other than what you would expect purely due to chance. That is the reason why scholars routinely test such disparities for "statistical significance" before concluding that any disparity is due to something other than pure "chance."

Second, even if the hypothetical disparity were found to be "statistically significant," it simply means that the disparity is due to something other than "chance." However, it does not mean that the disparity is necessarily due to discrimination. Other nondiscriminatory explanations exit and must be carefully considered before a reasonable conclusion about discrimination is drawn. Twenty years of research on labor markets have convinced me that such labor market phenomena as described in the hypothetical defy facile generalization.

Third, the percentage of minorities or women employed in a specific occupation in an area (such as the 20 percent figure in your hypothetical) is only an imperfect "estimate" of the availability of qualified women or minorities available and interested in any real sense for employment with any specific employer, and should be treated as such. That is, if Census data show that 20 percent of the plumbers in a labor market are members of a particular racial or ethnic group, the 20 percent figure should be treated as an estimate of availability rather than an exact figure. For example, many inexperienced apprentice might call themselves "plumbers" and are therefore in no real sense qualified for experienced plumbers' position with many successful plumbing firms. This issue must be considered carefully.

Fourth, many specific occupation such a plumber have no data published for them at all concerning the availability of minorities or women in them within many area of the country. Instead, reliable Census data are only available for very broad occupational groups for many parts of the country, permitting only very imprecise comparisons of labor market availability and employer utilization in specific occupations such as plumbers. The 20 percent availability figure in your hypothetical, in other words, may be subject to legitimate question on these grounds as well.

Fifth, if the 20 percent figure in the hypothetical was obtained from Census data, the actual percentage of real "applicant" for plumber positions in the firm in question might be less than 20 percent for any reasons having nothing to do with discrimination. For example, there are often serious questions about the appropriate geographic scope of the relevant labor market—e.g., whether an entire city and its suburbs or something larger or smaller should be considered when defining the relevant and appropriate labor market. The 20 percent availability for plumbers' positions may be accurate for an entire labor market but inaccurate for all parts of the labor market in question. The plumbing firm in question may not draw from the entire labor market, especially if the labor market is large as in many cities throughout the nation. Due to commuting options and patterns, for instance, the firm may only draw plumbers from a more proximate section of the labor market which contains only 10 percent minorities or women.

Sixth, even if minorities and women are 20 percent of the plumbers in an area and even if 20 percent of the firm's applicants were minorities or women, they may have less experience as plumbers, on average, than whites and males who applied. The plumbing firm with only 10 percent rather than 20 percent utilization may require experienced plumbers for reason other than discrimination and thus hire only 10 percent instead of 20 percent because of the need for more experienced crafts persons.

These examples are meant only to be illustrative and not exhaustive. I hope they are of some help in the committee's deliberations.

Senator METZENBAUM. Thank you very much, Professor Andrisani.

Your statement indicates that your experience suggests that it is a very real possibility that in the future employers would adopt quotas rather than try to meet the business necessity justification in the bill.

Based on your experience, are you aware of specific examples where an employer adopted a quota system rather than to try to meet the business necessity standards of *Griggs*?

Mr. ANDRISANI. You used the term quota. I am not sure I can think of a specific example of where an employer has used a quota to get around *Griggs*. And I am not even thinking in the context of *Griggs*, Senator. I am thinking essentially that if employers are made to feel—and I am saying if this is the case—that employers are made to feel that there is a labor market availability figure out there, that 20 percent of the plumbers in their city are black, that they then must have a 20 percent proportion of plumbers in their workforce.

If that is the case, employers will think, or many employers will think, in my opinion, that it may be easier to try to get 20 percent black than it would be to try to explain why they don't have 20 percent black.

And I think that if the 20 percent black figure is accurate, and I gave some reasons why it may not be, I think some very good reasons, another point is that a racially neutral employer who selects on a lottery basis won't end up necessarily, or all employers in an area, won't end up with 20 percent of their plumbers being black if they select on a racially neutral basis such as using a lottery. Many will have less, many will have more. They will sample. On average you will come up with employers in that area having 20 percent black, but many will have more and many will have less. And my point is that the ones who have less, who have fewer than 20 percent, they will feel that they are going to have a burden and they will feel that they don't want to be called into court and have to explain it.

Senator METZENBAUM. I understand what you said. But I don't think you answered my question. And that is, do you know where any employer has adopted a quota system rather than try to meet the business necessity standards of *Griggs*?

Mr. ANDRISANI. I don't know of any specific one, Senator.

Senator METZENBAUM. I just want to state that as I understand it, the definition of labor market and the analysis of labor markets under title VII did not change under *Wards Cove* and is not affected by this bill.

Mr. ANDRISANI. Senator, I am not a legal scholar. My concern is simply, as I said before, that the misuse of statistics can be a very serious problem.

Senator METZENBAUM. Mayor Hudnut, first, I know that your organization did quite an analysis, a study on this whole subject. Would you want to take a moment just to give us the substance of that study and the conclusions that were reached?

Mr. HUDNUT. Thank you, Mr. Chairman.

The U.S. Conference of Mayors, in collaboration with the Citizens Commission on Civil Rights, did undertake a poll—if that is the right word—of some 153 different cities from 41 States which participated in the study. And of that number—this was done early in 1990—89 percent of them, 136 of them, have equal opportunity or affirmative action plans, and they all, practically all of them, say that they feel that there have been positive effects as a result of their affirmative action programs in these cities.

Officials in 93 percent of the 136 cities feel that their plan has had positive results overall. Local affirmative action plans have increased job satisfaction in 32 percent of the cities; improved labor management relations in 44 percent of the cities; improved efficiency and productivity in 29 percent of the cities; helped to identify relevant qualifications for certain jobs in 62 percent of the cities; contributed to the improvement in the delivery of public service in 40 percent of the cities; contributed to an improved perception by the public of the quality of the services delivered by the city in 48 percent of the cities.

Only two—only two cities—reported that their equal opportunity or affirmative action plans had had an overall negative impact.

Senator METZENBAUM. And I am certain that in your study, Mayor, that there is probably a pretty good balance with respect to Democrats, Republicans, etc.?

Mr. HUDNUT. Well, I think so. But probably the preponderance was Democratic, since that is where the preponderance of local officials are. You're giving me an opening, but I wont' take it. [Laughter.]

Senator METZENBAUM. What impact has title VII, including the *Griggs* case and other cases applying that law, had as far as law enforcement is concerned, as far as integrating police departments, fire departments? What do you feel is that result?

Mr. HUDNUT. Well, sir, if the statistics in Indianapolis are any indication of what's happening nationwide, there has been improvement in the role of minorities and women in the police and fire departments of the Nation's cities in the years since the 1971 U.S. Supreme Court decision in *Griggs* v. *Duke Power*. In those years, cities across the country have revised their hiring and promotion procedures in order to eliminate practices which had the effect of excluding qualified women and minorities from their workforce.

Part of the turmoil that has been caused as a result of some of the actions or some of the decisions of the U.S. Supreme Court and some of the Justice Department's actions during the last decade has been felt at the local level because it has made it harder to administer cities. It has created racial friction in cities to constantly call into question some of these things that I thought for 20 years

we had sort of taken for granted as being progress in the civil rights area.

When the Justice Department comes into Indianapolis and tells us we have to dismantle our affirmative action program, it immediately sets off blacks against whites, it causes a counterproductive movement in our local police department where all the blacks congregate together and they file an amicus brief or something against the program that we have or against the people who are against the program that we have, and that kind of thing.

It just creates a lot of unnecessary turmoil. Things were working quite well, it seems to me. Given the fact that there will always be aggravation and there will always be people who accuse us of reverse discrimination and of passing over me because I am well qualified in order to get to a less qualified person, but things since the *Griggs* decision have been working pretty well in the cities of America.

Senator METZENBAUM. Thank you.

Attorney General Abrams, as attorney general you have been on both sides of this issue, representing the State as an employer and bringing actions on behalf of your citizens. From that perspective, how will *Wards Cove* change disparate impact litigation?

Mr. ABRAMS. *Wards Cove*, Senator, would have a dramatic impact. As the employer, we would be able to win more cases. And I think that would be unfortunate because we would be thwarting and stopping the advance of equal opportunity that has taken place across this country over the past two decades.

Obviously, too, as possible plaintiffs in actions, we would not be as successful because the burden of proof would be increased. We would have far more difficulty in being able to prove and demonstrate our case.

Senator METZENBAUM. As a public employer, were there any benefits to you in being forced to meet the business necessity standards of *Griggs*?

Mr. ABRAMS. Well, I think there have been positive benefits as a result of *Griggs* coming about. It has caused employers, whether they be in the private sector or the public sector—and I think Attorney General Katzenbach gave us some insight into that as he talked about his experience during his days at IBM—or in the public sector as well. It caused employers to take a look a lot more closely at the procedures and the standards and the methodology and the way they went about recruiting and hiring and testing for their prospective employees. Better selection tools have been developed over these decades.

So I saw *Griggs* as a very positive and beneficial thing to employers and to the public interest of our society.

Senator METZENBAUM. Mr. Burns, you testified that under *Griggs*, both plaintiffs and defendants won their fair share of cases. Was the *Griggs* standard of business necessity too burdensome for employers?

Mr. BURNS. No, it was not. And as I tried to indicate in my testimony, the primary reason for this is that the U.S. Supreme Court made a direct tie into job-relatedness which directly ties into the professional standards. And the professional standards are the ones that we feel we should be using anyway.

So what *Griggs* was really requiring us to do was to raise the professional level, raise the effectiveness of our standards, and develop better programs.

In the utility industry we established a consortia of companies to do wide-scale research. We had over 70 separate companies participating in this study on power plant operators. That study developed extremely effective selection procedures.

Those selection procedures have saved the companies millions and millions of dollars because operator error in power plants is extremely expensive both in terms of shutting down an enormously expensive operation and also then having to buy power that is usually more expensive. So a single operator error can easily cost hundreds of thousands or millions of dollars. And it has clearly been shown that the tests minimized those errors.

So there has been great benefit to the, shall we say, encouragement that employers received from *Griggs* to develop truly job-related selection standards.

Senator METZENBAUM. Do you think the business necessity defense, defined in section 3 of the bill, which is designed to reinstate the *Griggs* standard, will be an impossible standard for employers to meet?

Mr. BURNS. I don't interpret it that way because, as I have said, the technology, the professional technology, is going to have to still be applied. Now, when business necessity came out, people were saying, "Well, that's impossible because it has to be necessary to your business," and they raised the same kinds of arguments against business necessity that you are now hearing against "essential", that it is absolutely rigid, that it requires that your business is going to have to fail for you to be able to justify it. Those were the arguments that were raised in those days. But it never came to pass.

In the way that I look at the legal standard that is in the bill, that it will assume the same role that business necessity has; in other words, essential to effective job performance will really be a judgment of what the industrial psychologists call the criteria: Is it really necessary to do that?

For instance, in *Dothard*, the selection criteria was height and weight. One would assume that the people who put it in had some idea of some size and strength criteria that they were interested in. But then the issue became: Is that essential; is the criteria really needed; do you need to test that?

So I would see the definition in the bill having the same role with the same professional technology that business necessity does today regarding that technology.

Now, unfortunately, we can't get into that technology. There isn't time or a lot of other things. [Laughter.]

Senator METZENBAUM. Thank you, Mr. Burns.

Mr. Paras, is it your view that *Griggs* has been overly burdensome to employers for the last 18 years?

Mr. PARAS. That is really not the issue at all, Senator. It seems to me that there is a certain amount of artificiality of what is being written about this bill and about the discussion here. It is almost as if the proponents of this bill can establish that *Wards Cove*—and really we should be talking about *Watson* because that

is where the articulation comes—that *Watson* and *Wards Cove* somehow amend *Griggs*, then the proponents win and the bill ought to be enacted, and that if the people who oppose the bill can establish that that is not the case, then the legislation should be defeated.

That is absurd. The real issue is what is the impact of this legislation? *Griggs* is alive and well. It is alive and well after *Watson* and after *Wards Cove*. This morning your first two witnesses here, I thought as I heard them that I have seen *Griggs* in the flesh. Those were perfect examples of *Griggs* cases. But let's look at what *Griggs* really was.

Griggs was a question as to the application of a single objective employment factor in deciding whether or not the employer had made a business-related judgment. Now, the history of *Griggs* is interesting also. Even though as lawyers say, it is not an "intent case," what we had in *Griggs* was an employer who up to the point of the enactment of title VII had a workforce which was discriminated against.

In fact, there was a group of blacks in low-paying jobs and caucasians in other jobs. And then at the same time, what the employer did was to impose two standards—let's just deal with the high school diploma requirement—and made as a requirement the moving from, if you will, the black jobs to the white jobs, you had to have a high school diploma.

And all the court did, and quite correctly, in *Griggs* was to say the employer had to show—let's not argue about persuasion or proof—had to show that there was a job-relatedness to that requirement of having a high school diploma, which the employer could not show.

I submit to you, Senator, that the *Griggs* case could have just as easily been argued and decided as an intent case. That is not what we are faced with in *Wards Cove*, and that is not what the court was faced with in *Watson*. What they're talking about there is a much more difficult situation of what do you do with employer decisions that involve the application of a number of factors, most or all of which are subjective?

And indeed, I think the argument can well be made, and scholars have, that *Wards Cove* and *Watson* expand, do not contract, adverse impact analysis because for the first time—and this is what the court did in *Watson*—for the first time, the court said adverse impact analysis will be allowed in subjective decisionmaking cases, not just in object of decisionmaking cases.

And all it did in *Wards Cove* was to say if we are going to allow that, if we are going to measure those difficult elements in an employment decision, we had better be very clear about how we handle that because the consequences of handling that badly are going to be placing employers in a position to satisfy and protect themselves, they are going to develop quotas.

Now, that is what this is all about. And if you are for quotas, if you are for numerical proportionality, you should support this bill. And I understand that, and there are some people, I believe, who are for that. But if you are not, then this bill is a great danger in the American workplace.

Senator METZENBAUM. Mr. Paras, I almost thought you were going to filibuster us out of this hearing this morning. [Laughter.]

Let me just ask one last question: Let's assume this bill said nothing more than that notwithstanding any subsequent U.S. Supreme Court decisions, the *Griggs* case stands as the law of the land. Would you support the bill?

Mr. PARAS. I am not quite sure what you mean by "notwithstanding any subsequent U.S. Supreme Court decision."

Senator METZENBAUM. Well, let's just say that our legislation does nothing more than vitiate the *Wards Cove* case, made it very clear that that case is not the law of the land. I mean I am giving you an imaginary situation; that isn't what we are proposing. But I wanted to be certain that I understand you, and I am saying: Let's assume that this piece of legislation did nothing more than say that notwithstanding any subsequent U.S. Supreme Court decisions, the *Griggs* decision is the law of the land and shall be interpreted as such.

Mr. PARAS. Well, that I don't read—that is why I asked the question, Senator—I don't read that as a reversal of *Wards Cove*. I personally could see no problem with any legislation that merely endorses *Griggs*, the decision itself. But to do that does not necessarily reverse *Wards Cove*. What *Wards Cove* does, as I have said, is to summarize what the law had been prior to that in a context in which you have factors of subjective decisionmaking. That's all that *Wards Cove* does. That is all that *Watson* did.

Senator METZENBAUM. I guess I am not going to get an answer, so I pass it over to Senator Kassebaum.

Senator KASSEBAUM. I think you got an answer.

Mayor Hudnut, I would like to ask you, would you have a problem if the burden of proof was on the plaintiff to show that a specific employment practice was essential to job performance?

Mr. HUDNUT. Well, yes, I think that I would because I think it makes it very difficult on an individual victim of alleged harassment or discrimination if they have to prove the whole case.

Senator KASSEBAUM. If I understood Mr. Katzenbach correctly, he said he would not have a problem with that if the employer had kept good records, that, and going back to his point being that it was essential that an employer keep good records. If that is not the case, then you would be saying it would be very difficult for the plaintiff?

Mr. HUDNUT. Well, yes. I think that the recordkeeping is important. But there is a lot here when you get into the substities of race and sex discrimination that doesn't have much to do with recordkeeping.

Senator KASSEBAUM. Well, that is very true, but that is a burden for both the employer and the employee, is it not?

Mr. HUDNUT. Yes.

Senator KASSEBAUM. To show that?

Mr. HUDNUT. Yes.

Senator KASSEBAUM. General Abrams, I would like to ask you is there a difference in the allocation of the burden of proof for disparate treatment and disparate performance?

Mr. ABRAMS. Why don't I ask my solicitor general to take that one?

Mr. SHERWOOD. Traditionally, Senator, traditionally the U.S. Supreme Court has viewed the two analyses, disparate treatment and disparate impact, quite differently and has approached treatment cases in a way that is quite distinct from the treatment case—I am sorry—from the impact case.

McDonnell Douglas v. *Green* is the case that really lays out the treatment analysis in which the employee—and typically this is an individual case—in which the employee comes forward and shows very little, that he or she has applied for the job, was qualified for the job, that the job was available, and that despite his or her qualifications, that the individual didn't get the job.

Then the employer has to merely articulate a reason why this particular employee was not selected, and that gives the court the opportunity to then get to the issue as to whether or not intentional discrimination is underlying the decision that the employer made in that individual case. It was a way of handling proof in treatment cases.

In the impact cases, you are talking about what are essentially pattern and practice suits, where you are looking a systems of discrimination. And the approach there is quite different. The employee must demonstrate an adverse impact, taking into account many of the considerations that Professor Andrisani was talking about earlier on.

Having done that, and that is not necessarily an easy burden in order to establish one's prima facie case, but having established your prima facie case, having essentially raised the inference of discrimination, it then, under *Griggs*, was the employer's obligation to show that that practice that is challenged bears a manifest relation to the job in question and shifts the burden essentially to the employer.

The business necessity test comes down to being an affirmative defense. It's a different kind of case that you are dealing with in the impact area as opposed to the treatment area.

Senator METZENBAUM. Pardon me, Senator Kassebaum. I think Mayor Hudnut has to leave. I don't know if you have any questions for him.

But if not, we would certainly understand your leaving early, but perhaps Senator Kassebaum has a question.

Senator KASSEBAUM. I have already inquired of him.

Mr. HUDNUT. Thank you, Mr. Chairman.

Senator METZENBAUM. Thank you.

Please proceed, Senator.

Senator KASSEBAUM. Well, I always feel at a disadvantage, not being a lawyer, trying to get into the complexities of this. But is not one of the questions with *Wards Cove* that there is no prima facie case established and does that not impact on what you said?

Mr. SHERWOOD. I'm sorry?

Senator KASSEBAUM. I think you made a very good point, but one of the problems with this is that there was not that instance.

Mr. SHERWOOD. General Katzenbach I think responded to that concern. The case does have elements of it that have to do with whether or not the prima facie case was made. But the ruling in the case changed quite dramatically the rules that have governed effects cases since *Griggs*.

Senator KASSEBAUM. Mr. Paras, I would like to ask you, you mentioned that the legislation would encourage prolonged litigation. Why would that be so?

Mr. PARAS. Well, first of all, in the remedies section, which we haven't been talking about to date, there are provisions for adding compensatory remedies and punitive remedies. And what that does, I think, is up the ante in the cases.

The title VII in structure was modeled after the National Labor Relations Act. There are many similarities, including statute of limitations, for example, which is 6 months as a special provision here in deferral States, but without getting into that, the basic remedy in concept was to make people whole.

Take the discharge situation where an employee is terminated for a reason that interdicted by the statute. Then the employee is entitled to reinstatement plus back pay. That, by the way, is the same remedy as is applied under the National Labor Relations Act. And my study of European economies in this area, that is the most that Western European societies allow.

But what we now are proposing, the legislation proposes to do, is to add additional remedies. That will make it, in my experience, very difficult to resolve these cases.

The other main thrust of the statute, by requiring initial processing through an administrative agency was to encourage conciliation and resolution.

And it is not merely a statement of people like myself who practice that you should rely on. You should look at studies that have already been done, and particularly in my dear home State of California, where we have developed to an Nth degree a doctrine of lawful termination. And there has been a study done which shows that the recoveries in these cases have been totally disproportional to the harms that have been inflicted and that it has made it very difficult to settle those kind of cases.

Senator KASSEBAUM. So, indeed, going back perhaps to Senator Metzenbaum's question to you, this case does expand the remedies?

Mr. PARAS. The remedies in the legislation, as proposed, would.

Senator KASSEBAUM. It is not just going back to *Griggs*?

Mr. PARAS. Yes, it would clearly expand the remedies that are available today under the current statutory scheme.

Senator KASSEBAUM. And you feel this would lead to significantly more and prolonged litigation?

Mr. PARAS. Well, it is certainly going to lead to prolonged litigation. The issue that we have been talking about today, the *Wards Cove* case, in my view is going to lead to expanded litigation.

We often talk about "lawyers relief acts" when legislation is enacted, and that is sometimes overdone. But I can assure you that if this legislation is enacted in its present form, this is what I would call the "plaintiffs class-action lawyers relief act," because under this statutory amendment, to prove at a minimum a prima facie case and probably to establish necessary burden, all the plaintiff would have to show is that there is a numerical imbalance in a particular employer's workforce.

Let me give you but an example: Let us assume that in the lower jobs in an operation that 60 percent of those jobs are held by females and that in the executive level of that particular company 20

percent of those jobs are held by females. And as the professor has pointed out, there could be a lot of different reasons for that, none of which are discriminatory.

What this statute does is put the plaintiff in a position of having satisfied their burden of shifting to the employer now the burden—which we have talked about in our paper—of demonstrating nondiscrimination with regard to that. That is the greatest encouragement that I can think of to class-action case litigation.

We are talking about little individual cases because adverse impact has little or no meaning in individual cases, it only has meaning in class-action cases.

What *Griggs* required and what every single case after *Griggs* required was two things: First of all, that there be an identifiable employment characteristic. It is very interesting that all of the discussion that I have heard relates to such matters as testing. And that is totally within *Griggs*. So the plaintiff had the burden of establishing that there was a factor in the employment process that caused that disparity.

This statute takes away that requirement; the plaintiff no longer needs to do that because it describes in section (iii) and the (b) that the employment practice can include or be all the employment processes of that employer. That is merely a euphemism for saying that all the plaintiff has to do is come to court and demonstrate numerical imbalance.

As a result of that major, major change, you are going to have a tremendous amount of employment discrimination class-action litigation.

Senator KASSEBAUM. Do you agree with that, General Abrams?

Mr. ABRAMS. No, I think there would be so much uncertainty produced by the wiping away of two decades of, as Mayor Hudnut noted for us, I think, in a very convincing way—and he was speaking too on behalf of all the mayors across the country who have the responsibility of operating Governments—they knew what the lay of the land was. And I think by now, not adhering to that kind of rubric, that kind of standard, we run the risk of having a lot more litigation.

So I think a return to that kind of a yardstick brings about coherency to the process.

Mr. PARAS. Senator, may I just add one thing on that same point because it has not been mentioned?

Senator KASSEBAUM. Yes.

Mr. PARAS. It seems to me that the employer is placed in an impossible dilemma. To protect themselves against this class-action litigation exposure, the employer necessarily is going to try to structure his workforce—and we are not talking about entry-level; a lot of the discussion has been about hiring people, not about the issue of promotion, which may be an even more significant issue in this society today—he's going to have to structure his workforce so that it reflects, as I have said, proportionality.

That is not a solution, necessarily, because by doing that, all the employer has done is opened himself up now to the exposure of reverse discrimination cases.

So the real question that the employer may face is which risk do I want to assume: Do I want to assume the risk of the class-action

case being brought against me because my workforce is not proportionally balanced; and if I do that, what exposure have I created by the people that I have excluded by that process, of suing me because I have discriminated against them on that basis?

I see nothing in the statute that protects an employer in that circumstance.

Senator KASSEBAUM. I would guess that you clearly believe there is a difference in the allocation of the burden of proof for, say, a disparate treatment and a disparate impact case?

Mr. PARAS. Under this statute, there is no question. And that is one of the great ironies of the statute. I don't think—and you don't have to be a lawyer; I think any citizen would agree—that the worst form of discrimination—all forms of discrimination are bad so long as we are not talking about discrimination in the dictionary sense of merit differentiation—but the worst form of discrimination is intentional discrimination.

There is no attempt by this statute, at least as I read it—maybe I don't read it correctly—to reverse *McDonnell Douglas*, which deals with intentional discrimination. There is no question that under *McDonnell Douglas* the burden of proof, the burden of showing discrimination is that of the plaintiff.

What this statute does is to say that where the employer's actions, business-related, is no longer sufficient—there is no question that the standard is higher than business-related—but where the employer is making business decisions with no intent to discriminate and that has a disproportional impact upon that work population, he is going to have the burden of justifying that. The plaintiff will no longer have the burden of showing discrimination. Now, I think that is ironic.

I mean what you are really doing is imposing a greater burden of proof, a greater standard of action on the employer in an adverse impact situation than you do where an employer has acted intentionally against, has discriminated intentionally an individual. That makes no sense at all.

Mr. BURNS. Senator.

Senator KASSEBAUM. Please, Mr. Burns.

Mr. BURNS. There is a confusion here in that the apparent assumption is that with the different kinds of discrimination, that the way that you allocate burdens is some kind of a remedy.

To me the difference between whether an employer has the burden or the responsibility, as I would say, in a disparate impact case comes not from the seriousness of the discrimination but the fact that the employer has the responsibility for the selection procedure that is causing an adverse impact.

I think another thing that needs to be noted is that the outcome is very different. In a disparate treatment case, if the employer wins the case, then nothing happens. In a disparate impact case, if an employer wins the case, what that means is that an employee selection procedure continues that does have an adverse impact.

So the outcome of the case is that the selection procedure stays intact, the adverse impact continues because it is justified by job-relatedness. So the burden or the responsibility needs to be fitted to what happens in the case, not necessarily assuming that a legal burden is somehow a remedy.

I think there is a confusion here between burdens and remedies and outcomes. So I think it is not ironic in any sense that an employer has a responsibility in an impact case that is different than in treatment case.

Senator KASSEBAUM. Senator Metzenbaum has just said my time is up. [Laughter.]

Senator METZENBAUM. Thank you very much, Senator Kassebaum. We really appreciate your participation.

And thanks to each of the witnesses here today. Your testimony has been very helpful.

We have four more witnesses: L. Stanley Chauvin, Jr.; Professor Kingsley Browne; Cathie Shattuck; and Barry Goldstein.

We are happy to have each of you with us.

I think you all know of our 5-minute rule.

Mr. Chauvin is a partner in the law firm of Alagia, Day, Marshall, Mintmire and Chauvin, of Louisville, KY. Currently he is president of the American Bar Association, testifying on behalf of the ABA.

We are very happy to have you with us, Mr. Chauvin.

STATEMENTS OF L. STANLEY CHAUVIN, JR., ESQ., PARTNER, ALAGIA, DAY, MARSHALL, MINTMIRE AND CHAUVIN, ON BEHALF OF THE AMERICAN BAR ASSOCIATION, LOUISVILLE, KY; ACCOMPANIED BY WILLIAM ROBINSON, DEAN, UNIVERSITY OF THE DISTRICT OF COLUMBIA LAW SCHOOL; KINGSLEY BROWNE, PROFESSOR, WAYNE STATE UNIVERSITY SCHOOL OF LAW, DETROIT, MI; CATHIE A. SHATTUCK, ESQ., PARTNER, EPSTEIN, BECKER AND GREEN, WASHINGTON, DC; AND BARRY GOLDSTEIN, ESQ., SPECIAL CONSEL, SAPERSTEIN, SELIGMAN AND MAYEDA, OAKLAND, CA

Mr. CHAUVIN. Thank you, Senator Metzenbaum and Senator Kassebaum. I appreciate this opportunity to testify today on behalf of the American Bar Association. I am L. Stanley Chauvin, Jr., president of the association. I am accompanied today by William Robinson, the dean of the University of the District of Columbia Law School and a past chair of our Section of Individual Rights.

I am here to express the ABA's strong support for legislation to restore the Nation's civil rights statutes to their pre-1989 status.

The American Bar Association, founded in 1878, is the Nation's largest legal organization, with a membership of over 350,000 lawyers, judges, law professors, and law students.

One of the association's goals is to promote meaningful access to legal representation in the American system of justice for all persons regardless of their economic or social condition. To this end the association has sought to serve the American ideal of equal justice under the law. It has a proud history of opposing discrimination on the basis of race, gender, national origin, disability, or age.

Our time-honored concern with the quality of the administration of justice is never more important than when it concerns the very essence of justice: The ideal that there should be no right without a remedy; the ideal that the justice which is available in theory must also be available in practice; and the ideal that important disputes be resolved through an orderly process of adjudication instead of

through turmoil in the streets. The legislation before you today involves each of these three essential principles.

However, a series of cases decided by the U.S. Supreme Court last term has severely curtailed the ability of women and of racial minorities to vindicate their rights through the judicial process. They are, of course, the decisions addressed by S. 2104 and 2166, *Patterson*, *Wards Cove*, *Price Waterhouse*, *Lorance*, and *Wilks*.

These rulings reversed established precedents under the two most important laws that Congress has enacted to provide opportunities for racial, ethnic, and religious minorities and women to secure jobs that were historically denied to them. Title VII of the Civil Rights Act of 1964 and 44 U.S.C. 1981.

Collectively, the results of these decisions is to make it so difficult for victims to obtain justice that the rights which should be theirs, rights Congress has decreed they should have, can be violated with impunity. It falls to Congress to restore effective access to the courts.

In light of the breadth and depth of the impact of these decisions on the judicial constructions of the civil rights law, it is appropriate for Congress to approach the problems of effective redress for job discrimination by correcting the judicial interpretations of legislation which are erroneous and by making available to women and to religious minorities the same remedies for intentional discrimination which are available to racial minorities.

On February 12, 1990, the ABA House of Delegates resolved to support legislation to accomplish these goals. The underpinning of our policy is the principle which the association holds very dear: That determination involving basic civil rights should be made on the basis of fundamental fairness and equality, not on the basis of prejudice.

Before turning to the details of the court's decisions and of the proposed legislation, let me inject a personal note. I was born and raised in Kentucky. I know from firsthand observation the kinds of injustice to which black citizens have been subjected and the variety of the means employed to keep them powerless and poor.

I know also the harmful effects of racial injustice are not only visited upon persons who were black, although they bore the harshest brunt of injustice.

It was once said by the opponents of civil rights that it was impossible to legislate morality and that no act of Congress could change what lay in people's hearts. Congress proved them wrong in passing civil rights laws giving effect to the basic ideals of justice and fairness on which our Nation was founded.

Faced with a choice between old habits of thinking and such an appeal to their best instincts, the majority responded positively. We ought not, and we dare not, jeopardize the trust of deeply aggrieved persons that they will be able to obtain justice if they submit their disputes to the courts.

The rule of law and the functioning of our society depend on the effectiveness with which our legal system continues to earn that trust.

I will focus my comments this morning on the *Wards Cove* decision. However, I request that my entire prepared statement be inserted into the record of these proceedings. That statement dis-

cusses the five U.S. Supreme Court decisions and the principal bills, S. 2104 and S. 2166, which are before you.

Nineteen years ago, the U.S. Supreme Court unanimously construed title VII of the Civil Rights Act of 1964 as prohibiting not only intentional discrimination in employment but also those tests and practices which disproportionately exclude minorities or women from employment opportunities unless the challenged practices are proven by the employer to be so important to successful job performance that they should be allowed without regard to their exclusionary effect.

Griggs has proven to be the single most important title VII decision since 1964 and has resulted in reforming employment practices at all levels of private and public employment. The court's ruling in *Wards Cove* severely restricts the *Griggs* doctrine. The *Wards Cove* majority imposes a new and onerous requirement upon plaintiffs alleging the adverse impact of an employment practice upon large numbers of minorities or women.

After demonstrating that an employment practice disproportionately excludes women or minorities from employment, plaintiff must now further show that the practice does not serve the employer's legitimate employment goals. Thus, the burden of proving a business necessity for the employment practice is never assumed by the employer.

In addition, *Wards Cove* holds that even though it has been demonstrated that the combined result of several practices is to exclude a protected class of persons disproportionately, the plaintiff must also demonstrate the effect and a lack of a business justification for each practice. The plaintiff is being asked to prove a negative, a task which, because it is virtually impossible, our legal system has consistently refused to require of plaintiffs.

Wards Cove greatly diminishes the chance that plaintiffs will prevail in title VII cases challenging practices which have a discriminatory impact on employment opportunities.

I have just about 2 more minutes. I could go ahead and finish or I could let the rest of this statement be in the record.

Senator METZENBAUM. We will let you finish. You are speaking for the ABA. I think it's worthwhile to hear it.

Mr. CHAUVIN. Thank you.

Senator METZENBAUM. And besides I like what you're saying. [Laughter.]

Mr. CHAUVIN. Thank you.

Griggs has had as its fundamental premise that employment practices which are fair in form but discriminatory in operation would be deemed lawful only in circumstances where the employer was able to prove business necessity, defined as essential to effective job performance.

Wards Cove turns that principle on its head. Moreover, it now requires plaintiffs to examine each component of the employer's hiring or promotion system in an attempt to show the precise discriminatory effect and lack of business justification as to each part of the system. This will place substantially greater burdens of time and cost on title VII plaintiffs even in successful cases.

Section 4 of S. 2104 would restore the *Griggs* standard of the burden of proof in disparate impact cases. This amendment to the

1964 Civil Rights Act would require the employer to demonstrate the business necessity of a practice that has a disparate impact on the basis of race, color, religion, national origin, or sex, and would remove the requirement that a complaining party demonstrate which specific practice or practices within a group of practices or within an overall employment process, called a disparate impact.

Senator METZENBAUM. Could you wind up, please, Mr. Chauvin?

Mr. CHAUVIN. Yes, sir. This standard, prior to last year's decision, proved a balanced approach which is not that onerous to business and should be continued.

We support the provisions of S. 2104 in this regard.

Senator METZENBAUM. Thank you very much.

Mr. CHAUVIN. Thank you, sir.

[The prepared statement of Mr. Chauvin follows:]

PREPARED STATEMENT OF L. STANLEY CHAUVIN, JR., ON BEHALF OF THE AMERICAN BAR ASSOCIATION

Mr. Chairman and Members of the Committee:

I appreciate this opportunity to testify today on behalf of the American Bar Association. I am L. Stanley Chauvin, Jr., President of the Association, and I am here to express the ABA's strong support for legislation to restore the Nation's civil rights statutes to their pre-1989 status.

The American Bar Association, founded in 1878, is the nation's largest legal organization with a membership of over 350,000 lawyers, judges, law professors, and law students. One of the Association's goals is to promote meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social condition. To this end, the Association has sought to serve the American ideal of equal justice under the law, and has a proud history of opposing discrimination on the basis of race, gender, national origin, disability and age. We have adopted policies opposing discrimination in employment, housing, public accommodations, credit, education and public funding. We have urged these policies in these halls of Congress, and we have argued our position, as an amicus, in the Supreme Court.

Our time-honored concern with the quality of the administration of justice is never more important than when it concerns the very essence of justice: the ideal that there should be no right without a remedy; the ideal that the justice which is available in theory must also be available in practice; and the ideal that important disputes be resolved through an orderly process of adjudication instead of through turmoil in the streets. The legislation before you today involves each of these three essential principles.

We, as a Nation, are committed to these ideals. However, a series of cases decided by the Supreme Court last term have severely curtailed the ability of women and of racial minorities to vindicate their rights through the judicial process. They are, of course, the decisions addressed by S. 2104 and 2166: *Patterson* v. *McLean Credit Union*,[1] *Wards Cove Packing Co.* v. *Atonio*,[2] *Price Waterhouse* v. *Hopkins*,[3] *Lorance* v. *AT&T Technologies, Inc.*,[4] and *Martin* v. *Wilks*.[5]

These rulings reversed established precedents under the two most important laws that Congress has enacted to provide opportunities for racial, ethnic and religious minorities and women to secure jobs that were historically denied to them—Title VII of the Civil Rights Act of 1964 [6] and 42 U.S.C. § 1981.[7] Collectively, the result of these decisions is to make it so difficult for victims to obtain justice that the rights which should be theirs—rights Congress has decreed they should have—can be violated with impunity. It falls to Congress to restore effective access to the courts.

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[1] 491 U.S. ——, 105 L.Ed.2d 132, 109 S.Ct. 2363 (1989).
[2] 490 U.S. ——, 104 L.Ed.2d 733, 109 S.Ct. 2115 (1989).
[3] 490 U.S. ——, 104 L.Ed.2d 268, 109 S.Ct. 1775 (1989).
[4] 490 U.S. ——, 104 L.Ed.2d 961, 109 S.Ct. 2261 (1989).
[5] 490 U.S. ——, 104 L.Ed.2d 835, 109 S.Ct. 2180 (1989).
[6] 42 U.S.C. § § 2000e *et seq.*
[7] 16 Stat. 144.

In light of the breadth and depth of the impact of these decisions on the judicial construction of the civil rights laws, it is appropriate for Congress to approach the problem of effective redress for job discrimination by correcting the judicial interpretations of legislation which are erroneous, and by making available to women and to religious minorities the same remedies for intentional discrimination which are available to racial minorities.

On February 12, 1990, the House of Delegates of the American Bar Association resolved to support legislation to accomplish these goals. A copy of the resolution, and a copy of the Report of the Section of Individual Rights and Responsibilities supporting the resolution, are attached to this testimony. The underpinning of our policy is a principle which the Association holds very dear: that determinations involving basic civil rights should be made on the basis of fundamental fairness and equality, not on the basis of prejudice.

Before turning to the details of the Court's decisions and of the proposed legislation, I would like to inject a personal note. I was born and raised in Kentucky. I know from first-hand observation the kinds of injustice to which black citizens have been subjected, and the variety of the means employed to keep them powerless and poor. I know also that the harmful effects of racial injustice were not only visited upon persons who were black, although they bore the harshest brunt of injustice.

The Supreme Court's 1954 decision in *Brown* v. *Board of Education* [8] turned out to have been a breath of fresh air needed as much by whites as by blacks. Not everyone realized it at the time, and there was substantial resistance to the decision. As the rule of law gradually prevailed across the Nation, however, more and more people came to see that the freedom of all of us resides in the freedom of the least powerful among us.

It was once said by the opponents of civil rights that it was impossible to legislate morality, and that no Act of Congress could change what lay in people's hearts. Congress proved them wrong in passing civil rights laws giving effect to the basic ideals of justice and fairness on which our Nation was founded. Faced with a choice between old habits of thinking and such an appeal to their best instincts, the majority responded positively.

We have come a long way. That we have come so far, and that we have come so far so peacefully, is a tribute to the soundness of the legislation enacted in 1964, to the legal system which made the promises of that legislation real, and to the willingness of the dispossessed to look to the legal system for redress.

Sometimes, we in this country tend to forget just how unique we are among the nations. We tend to take for granted that the most deeply aggrieved persons will naturally submit their grievances to an impartial forum, that they will have a fair opportunity within than forum to explore the facts; and that they will naturally submit to its judgments. We have only to look around the world, however, to see how unusual is such a system.

We ought not, we dare not, jeopardize the trust of deeply aggrieved persons that they will be able to obtain justice if they submit their disputes to the courts. The rule of law and the functioning of our society depend on the effectiveness with which legal system continues to earn that trust.

Wards Cove Packing Co. v. *Atonio*

1. *The Progress Made as a Result of the "Griggs Rule"*

Nineteen years ago, at the request of Solicitor General Erwin N. Griswold and the private plaintiffs, the Supreme Court unanimously construed Title VII of the Civil Rights Act of 1964 as prohibiting not only intentional discrimination in employment, but also those tests and practices which disproportionately exclude minorities or women from employment opportunities, unless the challenged practices are proven by the employer [9] to be so important to successful job performance that they should be allowed without regard to their exclusionary effect.[10] In the words of the attached Report of the Section of Individual Rights and Responsibilities, "*Griggs* has proven to be perhaps the single most important Title VII decision since 1964 and has resulted in reforming employment practices at all levels of private and public employment."

We should pause to reflect on the reality which this statement so briefly describes. In 1964, few blacks, Hispanics, Asians or women served as police officers.

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[8] 347 U.S. 483 (1954).

[9] For the sake of convenience, I refer throughout my testimony to the obligations of employers under the *Griggs* rule. Employment services, unions, and joint labor-management committees controlling apprenticeship and other training programs are also covered under Title VII and have similar obligations.

[10] *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 28 L.Ed.2d 158, 91 S.Ct. 849 (1971).

Discriminatory paper-and-pencil tests, and discriminatory height requirements, excluded them from these jobs. Today, they are far better represented on police forces because of a long series of cases which have successfully challenged such requirements under the *Griggs* standard. The result has been more effective police forces, and an important benefit to society. So, too, with many other types of jobs which were once almost exclusively held by men who were white. These changes were made possible through litigation under *Griggs*, and through voluntary employer actions based on the settled understanding of the law as declared by *Griggs*.

If we take away the engine which drove this progress, we face not only the risk that the rate of progress will decline or halt altogether: We also face the risk that the nation will lose the stability established by victories won long ago.

2. *The Effect of the Wards Cove Decision*

The Court's *Wards Cove* decision changed both parts of the traditional *Griggs* analysis:

(1) By holding that plaintiffs should bear the burden of isolating the particular parts of an employer's selection procedures which have disparate impact and showing the extent of the disparate impact attributable to each such part, the Court made it more difficult for plaintiffs to prove adverse impact, and in some cases may have made the plaintiffs' burden impossible to meet.

(2) By holding that employers responding to a showing of adverse impact only have to meet an ill-defined burden of production, and that plaintiffs must prove that the challenged practice is not justified, the Court has made it relatively easy for the employer to rebut the showing of adverse impact, and has laid a burden on the shoulders of plaintiffs which in most cases may be impossible for them to carry.

Every practicing attorney is familiar with the fact that what seems to be only a technical change in procedural or evidentiary rules may in reality pre-determine the outcome of hundreds of cases. As shown below, the "technical" changes made by *Wards Cove* appear to be such an instance and I understand that there has been testimony given to this Committee that over 300 *Griggs* cases were changed by the *Wards Cove* decision.

3. *The Burden of Separating the Employer's Practices and Showing the Separate Adverse Impact of Each Practice*

It is not always easy for a plaintiff to be able to show adverse impact, but as difficult as plaintiffs' burden was in some cases prior to *Wards Cove*, it has now been upgraded substantially by the addition of the requirement that plaintiffs show the separate adverse impact of each practice challenged.

As the United States represented to the Court in *Wards Cove*, there are cases in which a group of employment standards causes adverse impact, and where it is simply not possible to identify the particular practice(s) causing the adverse impact. This is clearly correct; many employers consider a number of different factors simultaneously in making a selection decision, or do not record the reasons for their selections. The government suggested to the Court that, at least in these cases, the plaintiff should be allowed to challenge the group of practices as a whole.[11] To require a plaintiff to make an impossible showing is to pre-determine a judgment for the employer. If Congress were to allow such a standard to remain in place, employers would have an incentive to rearrange their employment practices in a way which would effectively make them immune from challenge.

Sections 3, 4, and 9 of S. 2104 would resolve these problems in a manner fair to all concerned. The employer is in the best position to know which of its selection practices [12] contributes to any overall adverse impact. By coming forward with information documenting the particular practice causing the adverse impact, the employer can, if it wishes, readily narrow the case against it. The burden of disaggregating the effect of a number of employment practices should in fairness rest upon the party best able to bear it, and best able to make a determination whether it sees any benefit in disaggregation.

Moreover, the intent of Congress is best served if employers routinely keep records showing whether any specific employment practices cause adverse impact to racial minorities or to women, so that they can focus on "problem" practices and make a reasonable business decision as to the justification for such practices in advance of any litigation. With this information, employers can make an informed de-

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[11] Brief for the United States as *amicus curiae* (September 1988).

[12] Sec. 3 of the bill would add a subsection (n) of § 701 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. Subsection (n) would define the phrase "group of employment practices" as meaning "a combination of employment practices or an overall employment process". I think it is fairly clear that this would refer to practices used in the selection process for hire, promotion, training opportunities, and the like.

cision whether to begin, continue, or modify such practices. The ideal situation is one in which employers have an incentive to eliminate problems before harm is done, or before further harm is done.

This is much likelier to occur under the standards of S. 2104 than under the standards of *Wards Cove*. An employer which knows that it has the burden of disaggregating its practices is much likelier to keep these types of records and focus on the results shown thereby. An employer which knows that the plaintiff has the burden of disaggregation, and cannot meet this burden in the absence of such records, will be much likelier to avoid the making and keeping of proper records.

4. *Affirmative Defenses Are Not Novel*

Requiring plaintiffs to disprove the business need for a challenged selection practice is not in accordance with the traditional allocations of the burden of persuasion. The assertion that a challenged practice is required by business necessity is in the nature of an affirmative defense. In our legal system, the defendant has the burden of persuasion in establishing an affirmative defense.

This is not new. In *Cathcart* v. *Robinson*,[13] Chief Justice Marshall held that allegations of fraudulent inducement to enter into a contract were an affirmative defense to an action for specific performance, which the defendant had the burden of proving. In *Bank of the United States* v. *Beverly*,[14] the Court held that a plea of *res judicata* was an affirmative defense, "which the defendant must prove, or it can have no effect". Even in criminal cases, as to which the prosecutor has the burden of persuasion beyond a reasonable doubt, the Congress and State legislatures have created affirmative defenses as to which the criminal defendant has the burden of persuasion. For example, the Insanity Reform Act of 1984 [15] defines insanity as an affirmative defense in Federal prosecutions, and states: "The defendant has the burden of proving the defense of insanity by clear and convincing evidence."

5. *The Standard of Proof a Defendant Must Meet*

I understand that former Solicitor General Fried has testified before this Committee that "business necessity" is shown whenever the employer can show a reasonable basis for the challenged practice. With respect, I must disagree. A "reasonable basis" standard is uncomfortably close to a "good faith" standard, and this would destroy the essential rationale for the disparate-impact theory: requiring employers to evaluate exclusionary practices and determine whether they are so important to the employer's normal operations that they should continue to be used without regard to their exclusionary effect. As a matter of public policy, Congress should require a high standard for the justification of strongly exclusionary practices.

Secs. 3 and 4 of S. 2104 require employers to show that a practice with adverse impact against women or members of minority groups is required by business necessity, which is defined as "essential to effective job performance." This is fully in accordance with the intent of Congress in extending the *Griggs* rule to public employers—and ratifying it for private employers in 1972. This language has also been used by the Supreme Court in *Dothard* v. *Rawlinson* and *Dothard* has been cited in subsequent Supreme Court decisions.[16]

House Report No. 92-238 (92nd Cong., 1st Sess.), 1972 *U.S. Code Cong. & Admin. News* 2137, 2157 states that, "if the use of the test acts to maintain existing or past discriminatory imbalances in the job, or tends to discriminate against applicants on the basis of race, color, religion, sex, or national origin, the employer must show an overriding business necessity to justify use of the test."

The term "overriding business necessity" would not seem to be different in kind than the term "essential to effective job performance". The basic concept is clear: employment practices which substantially exclude women or members of minority groups should be continued only upon the strongest of evidence. Weak evidence of job-relatedness should not be enough to justify strong adverse impact. Nor should assumptions about the validity of tests, or assumptions that a validation study ordinarily under-estimates the degree of job-relatedness, be confused with evidence that a particular practice is required by business necessity. See, for example, the rejections of similar positions in the majority and concurring-and-dissenting opinions in *EEOC* v. *Atlas Paper Box Co.*[17]

This approach is consistent with the Court's original treatment of the employer's burden in disparate-impact cases. In *Griggs*, the Court rejected the explanation of a

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[13] 5 Peters (30 U.S.) 264, 268, 8 L.Ed. 120, 121 (1831).
[14] 1 Howard (42 U.S.) 134, 151, 11 L.Ed. 75, 82 (1843).
[15] Sec. 402(a) of Pub.L. 98-473, 98 Stat. 2057, 18 U.S.C. § 17.
[16] 433 U.S. 321, 331, 53 L.Ed. 2d 786, 799, 97 S.Ct. 2720 (1977).
[17] 868 F.2d 1487 (6th Cir.), *cert. den.*, 58 U.S. *Law Week* 3213 (1989).

company vice-president that the challenged requirements "generally would improve the overall quality of the work force".

The language of S. 2104 as to the employer's burden is fully consistent with the Court's original understanding of disparate-impact standards in these cases, and is fully consistent with the intent of Congress in enacting the 1972 amendments to Title VII.

Price Waterhouse v. *Hopkins*

Price Waterhouse held that, when a plaintiff shows that an employer acted with a mixture of discriminatory motives and legitimate motives, the employer has the burden of persuasion, by a preponderance of the evidence, that it would have made the same decision in the absence of the unlawful motive. If the employer carries its burden, there is no violation of Title VII.

We agree with the provision of S. 2104 stating that back pay and job placement should not be available to a plaintiff where the employer proves that it would have reached the same decision in the absence of the discriminatory motive.[18] The question before the Congress is whether employers proven to have made employment decisions partly because of discriminatory motives should escape all liability. The point here is quite simple: if it is proven that the employer engaged in intentional discrimination in violation of the statute, the employer should not walk away as a complete winner. That result would sent a terrible message that racism or sexism is acceptable as long as it is accompanied by a second reason for taking the action.

In addition, common sense indicates that an employer which once bases employment decisions partly on race, gender, national origin, or religion is likely to do so again if there are no adverse consequences to doing so. An injunction should be available to prevent a recurrence. An award of damages should be available if the employer's discrimination was accompanied by conduct which humiliated or otherwise injured the plaintiff. An award of attorneys' fees and expenses should be available so that the plaintiff who successfully proved reliance on an unlawful motive is not penalized by being forced to bear his or her own costs of litigation.

Martin v. *Wilks*

Wilks allows persons who were not parties or class members in a fair employment case to file subsequent lawsuits collaterally attacking the relief obtained, whenever they are affected by that relief. The court held that such persons do not have a duty to intervene in the enforcement action even after notice. The only way by which the parties can avoid subsequent collateral attacks is by joining the nonparties, an unrealistic option in many workplaces with thousands of applicants and employees.

Prior to *Wilks*, virtually all of the federal courts of appeal followed the "impermissible collateral attack" rule that precludes persons who refuse to intervene from subsequently bringing separate discrimination claims against parties to a consent decree for actions taken pursuant to the decree. The Court's five-member majority rejected this rule in *Wilks*, holding instead that firefighters could not be bound by the consent decree unless they had been joined as a party in the prior litigation.

After this ruling, it is possible that white employees could delay almost indefinitely the implementation of an affirmative action plan which is necessary to remedy years of discrimination against blacks. Under *Wilks*, each white employee who is not joined as a party in the original suit can bring a reverse discrimination claim when the employer attempts to implement the decree. *Wilks* appears to apply to fully litigated relief orders as well as consent decrees. Moreover, a person can wait years after the order or decree has been entered to bring his challenge, even if he knew about the earlier action and had an opportunity to intervene in it.

Wilks jeopardizes many existing Title VII consent decrees and will clearly discourage future settlements in these cases by removing the benefit to the employer of being able to avoid further litigation by settling.

However, *Wilks* is not limited to decrees containing race- and gender- conscious relief. In theory, every decree providing any kind of relief which could be considered to disadvantage any non-party is now subject to collateral attack under *Wilks*. Even a decree enjoining the use of an old-boy network disadvantages the people who were former beneficiaries of such a network.

Some of these challenges may be appropriate, and some challengers may be entitled to relief. The important goal is not to shut them out of court, but to provide an orderly system by which they can assert their rights and be heard, subject to reasonable deadlines of the same kinds which bind all other parties.

S. 2104 accomplishes this goal by establishing standards for providing interested nonparties with notice and an opportunity to be heard when a litigated or consent

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[18] Sec. 5(b) of the bill.

order is proposed in an employment discrimination case, and then generally barring subsequent challenges by nonparties where these standards have been met. This amendment would thus provide a means of achieving finality in a case, without requiring the parties and the court to continually re-litigate the same challenges in separate actions, while at the same time protecting the due-process rights of interested nonparties.

Patterson v. McLean Credit Union and Damages Under Title VII

Patterson held that 42 U.S. § 1981 did not cover racial harassment, or racial discrimination in the terms and conditions of employment, and that it was limited to discrimination in hiring, in some promotions, and in the enforcement of contracts. We are gratified to see that the Administration has studied the effects of this decision and has agreed that § 1981 should be amended to cover discrimination after the formation of the employment contract, including harassment and termination. I believe, however, that S. 2104 is preferable to the Administration bill in accomplishing this result in that S. 2104 clearly prohibits discrimination throughout the contractual relationship while the Administration throughout the contractual relationship while the Administration proposal could be read to apply only to the terms and conditions which are set in the original contract.

Section 1981 is important for two reasons. *First*, it covers employers too small to be covered by Title VII, and covers some conduct outside the employment relationship. *Second* and most importantly, it makes damage remedies available for intentional discrimination [19] based on race or ethnic group.[20] The Administration's support for an amendment to § 1981 seems to be a recognition that damage remedies are sometimes necessary to provide an adequate remedy for intentional discrimination.

We agree, and urge the Congress to extend the same remedies for the other forms of intentional discrimination covered by Title VII: discrimination because of gender and discrimination because of religion. Harassment and other mistreatment of an individual works the same injury to that individual whether the harassment or mistreatment is based on race, on sex, or on religion. An award of back pay does not provide a remedy for that injury, because back pay is simply compensation for lost earnings. An individual who is denied a promotion because of a test score, and an individual who is denied a promotion after being subjected to the most vicious racial, ethnic, sexual, or religious slurs or mistreatment imaginable,[21] will each receive the identical award of back pay even though their injuries are very different. The result is that injuries other than lost earnings are never remedied at all.

S. 2104 would provide a remedy for injuries which cannot be redressed by awards of back pay. The bill does not allow awards of compensatory or punitive damages for disparate-impact discrimination, and does not allow awards of punitive damages against Federal, State, or local government agencies. It preserves the right to jury trial when damages in excess of back pay and prejudgment interest are sought. It preserves the EEOC's functions of investigation and conciliation by providing the expanded damage remedy only for plaintiffs who file charges with the EEOC.

Certainly, some employers will be distressed that acts of intentional discrimination may subject them to liability for more than lost earnings. Similarly, some business officials are distressed that they can be subjected to damage liability because they commit violations of the antitrust or securities laws, because their employees drive carelessly, or because someone is injured when they leave their premises in an unsafe condition. Such distress is understandable, but is no reason to deprive those who are injured of an effective remedy.

Awards of compensatory damages and, in cases in which the requirements for punitive damage awards are met, punitive damages are the standard means by which our legal system remedies such harms. There is no logical reason why these standard remedies should be unavailable in cases of intentional employment discrimination, particularly when the absence of these remedies would leave individuals with-

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[19] The Supreme Court held in *General Building Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 73 L.Ed.2d 835, 102 S.Ct. 3141 (1982), that 42 U.S.C. § 1981 prohibited only intentional discrimination. This holding would not be changed by S. 2104.

[20] The Court held in *Saint Francis College* v. *Al-Khazraji*, 481 U.S. 604, 95 L.Ed.2d 582, 107 S.Ct. 2022 (1987), and *Shaare Tefila Congregation* v. *Cobb*, 481 U.S. 615, 95 L.Ed.2d 594, 107 S.Ct. 2019 (1987), held that § 1981 prohibited discrimination based on membership in particular ethnic groups as well as discrimination based on race.

[21] *E.g., Brooms* v. *Regal Tube Co.*, 881 F.2d 412 (7th Cir., 1989) (racial and sexual harassment of a black woman); *Bohen* v. *City of East Chicago, Indiana*, 799 F.2d 1180 (7th cir., 1986) (sexual harassment); *Mithcell* v. *OuAir, Inc.*, 629 F.Supp. 636 (N.D.Ohio, 1986) (racial and sexual harassment of a black woman); and *Compston* v. *Borden, Inc.*, 424 F.Supp. 157 (S.D.Ohio, 1976) (religious harassment).

out anyway of obtaining redress for violations of their rights. Indeed, their provision should also have the beneficial effect of causing employers to be less tolerant of intentional discrimination in the workplace.

Lorance v. AT&T Technologies

Lorance held that the time for filing an EEOC charge of discrimination challenging intentionally discriminatory changes in a seniority system began to run on the adoption of the changes even though no one suffered a loss of job status at that time, and that a charge filed after the loss of job status was untimely. We are gratified that the Administration agrees that this basic decision is unfair to employees, and that it supports a legislative correction. Again, however, I believe that S. 2104 is preferable to S. 2166 in this regard because the amendment would apply to all employment practices rather than only to seniority systems. This is an important difference because some courts have applied *Lorance* beyond the context of seniority provisions.

Mr. Chairman, I thank you for the opportunity to present this testimony today.

Senator METZENBAUM. Professor Kingsley Browne, of Wayne State University Law School, in Detroit.

We are happy to have you with us.

Mr. BROWNE. Thank you, Mr. Chairman.

To stave off the executioner, I will confine my remarks this morning to the suggestion that *Wards Cove* constituted a radical departure from prior law. There are three aspects of *Wards Cove* that its critics find objectionable:

The first is the holding that a plaintiff must identify a specific practice or practices that have caused the observed disparity. The U.S. Supreme Court has never held that a challenge to bottom-line statistics was appropriate in a disparate impact case. On the contrary, all of its cases have involved challenges to discrete requirements, such as standardized tests or specific job qualifications, and the plaintiff has been required to demonstrate that those requirements caused the impact.

In *Furnco Construction Corporation* v. *Waters*, the court expressly held that a challenge to the employer's subjective hiring practices should be analyzed as a disparate treatment case rather than as a disparate impact case.

The second point of contention concerns what the employer must show once a disparate impact has been demonstrated. The U.S. Supreme Court has always required that the challenged practice be job-related to be valid. That is what it required in *Griggs*, and that is what it required in *Wards Cove*. The current bill goes far beyond the case law to require that a practice be essential to effective job performance—not related to effective job performance, not predictive of effective job performance, not correlated with effective job performance—but essential to effective job performance.

That precise language comes from the case of *Dothard* v. *Rawlinson*, but it is important to emphasize that that was not from the court's holding, but rather from a characterization of a party's argument.

The reason that we face this controversy today is that the court in *Griggs* used the phrase "business necessity" to describe the required justification for a challenged practice.

However, the court explained in *Griggs* exactly what it meant by business necessity. It said, "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."

Although the phrase business necessity appears only once in *Griggs*, the idea that a practice must be job-related appears at least eight times. I can't count much higher than that. It may be in there much more often than that.

I assume that the proponents of the bill today are skeptical about the characterizations of the *Griggs* test by justices in the majority in *Wards Cove*. But consider the following statements of the tests by dissenters in *Wards Cove* and other cases.

Justice Stevens, dissenting in *American Tobacco Company* v. *Patterson*, says that an employment practice is lawful if it "is substantially related to a valid business purpose." That sounds a lot like the standard in *Wards Cove*, where the practice must "serve in a significant way the legitimate employment goals of the employer."

Justice Stevens again, this time writing the majority opinion in *New York Transportation Authority* v. *Beazer*, he states that an employment practice is justified if the employer's goals are "significantly served by, even if they do not require," the practice.

Justice Brennan, this time from *Washington* v. *Davis*, he says that the employer "should have been required to prove that the police training examinations either measure job-related skills or predict job performance."

Justice Blackmun, concurring in *Albemarle Paper Company* v. *Moody*, stating that preemployment testing is valid "so long as it is fairly related to the job skills or work characteristics desired." This is not the language of strict necessity.

The purpose of the *Griggs* test is to eliminate arbitrary barriers to achievement of minorities, not to interfere with the employer's right to require relevant qualifications. *Wards Cove* continues that rule.

The third aspect of *Wards Cove* that would be overturned is its placement of the burden of production, but not the burden of persuasion, on the employer. In so holding, the court did not deviate from its prior cases. Although the court in prior cases had spoken in terms of the employer proving, showing, and demonstrating, those terms are as consistent with the production burden as they are with the persuasion burden.

The history of the burden of proof issue, under the disparate treatment doctrine, was very similar. For example, in *Furnco* the court stated that once a prima facie case of intentional discrimination is made out, the employer's obligation is "proving that he based his employment decision on a legitimate consideration." The court made clear in *Burdine* that it was referring in *Furnco* to a production burden, not a persuasion burden.

The court was correct in leaving the burden of persuasion on the plaintiff, which is where it traditionally rests in civil litigation. Even under a disparate treatment theory, the plaintiff's prima facie case does not shift the burden of persuasion, even though it is said to show that it is more likely than not that illegal discrimination has occurred.

Thank you.

Senator METZENBAUM. Thank you very much, Mr. Browne.

[The prepared statement of Mr. Browne follows:]

PREPARED STATEMENT OF KINGSLEY R. BROWNE

INTRODUCTION

In 1964, Congress enacted landmark legislation designed to ensure that employment decisions be made without regard to race, color, national origin, religion, or sex. According to the sponsors of the Civil Rights Act of 1964, employment decisions were to be based on merit rather than status.[1] In 1971, in an attempt to further Congress's objectives, the Supreme Court in *Griggs* v. *Duke Power Co.*[2] unanimously held that even facially neutral practices violate Title VII if they produce a "disparate impact" and if they are not job related. Although Title VII does not outlaw arbitrary practices *per se*, it outlaws them to the extent that they have an exclusionary effect on protected groups. The Supreme Court has never wavered from this position and, indeed, reaffirmed it last term in *Wards Cove Packing Co.* v. *Atonio*.

Congress currently has before it a bill designed in part to overrule *Wards Cove*, which some have argued limited the scope of the *Griggs* holding. However, rather than returning the law to its "pre-*Wards Cove*" state, the current bill would constitute a dramatic change in the law that is inconsistent with *Griggs*, with the current language of Title VII, and with the underlying anti-discrimination purpose of Title VII. Rather than simply prohibiting specific nonjob-related practices that produce a disparate impact—which, as discussed below, was the law both before and after *Wards Cove*—the new bill would, as a practical matter, require "proportional representation," which is simply a polite word for quotas.

Three elements of S. 2104 work together to mandate the above result. First, a plaintiff no longer need challenge a specific employment practice, but may instead challenge the "overall employment process"; in other words, the plaintiff may simply challenge the "bottom line" employment statistics. Second, an employer may no longer defend against such a challenge by showing that a given requirement is "job related"; instead, it must show that the requirement is "essential to effective job performance," a considerably more rigorous standard and one that will seldom be satisfied. Finally, the burden of persuasion is imposed on the employer defendant to prove "business necessity," deviating from the traditional civil-litigation standard that imposes the burden on the plaintiff to prove a violation of the law and his right to recover. Since the plaintiff no longer is obligated to challenge a specific practice, it is far from clear exactly how the employer would even attempt to show "business necessity."

The shift in the guiding philosophy of Title VII that would be effected by S. 2104 cannot be underestimated. The changes created by the bill are not merely "technical" corrections, but instead fundamental changes to the central principle of Title VII. Rather than standing as a bulwark against discrimination, as it has for a quarter of a century, Title VII would now itself *require* discrimination. Any employer who has not met its quota of women and minority hires is presumptively in violation of Title VII. That presumption can be overcome only by satisfying the heavy burden of "business necessity" as the term is defined in the bill. Since almost no practice is "essential to effective job performance" or "necessary to the operation of the business," an employer will have only one way to comply with the law.

Although the Summary of the Act states that "it does not affect or change the law governing affirmative action," the bill most assuredly will have that effect even if that is not the purpose of the sponsor. Under current law, employers *may* grant preferences to members of protected groups where there is a "manifest imbalance in traditionally segregated job categories" and where the preferences do not unduly burden nonminorities.[3] Courts, on the other hand, may *order* preferences only to remedy past discrimination, and then only in especially egregious circumstances.[4] Legislative bodies may enact preferences only to further an identified "compelling governmental interest."[5] The bill currently under consideration *requires* that employers engage in affirmative action whenever there is a "manifest imbalance" in any job category, *irrespective* of whether there has been prior discrimination.

If Congress wishes to convert Title VII into a proportional representation statute, the debate should be proceeding on a different level. That is, we should be debating

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[1] Senator Humphrey stated: "what [Title VII] does . . . is simply to make it an illegal practice to use race as a factor in denying employment. It provides that men and women shall be employed on the basis of their qualifications. . . ." 110 Cong. Rec. 13,088 (1964).

[2] 401 U.S. 424 (1971).

[3] *Johnson* v. *Transportation Agency*, 480 U.S. 616 (1987).

[4] *Local 28, Sheet Metal Workers* v. *EEOC*, 478 U.S. 421 (1986).

[5] *City of Richmond* v. *J.A. Croson, Inc.*, 109 S.Ct. 706 (1989).

whether mandatory quotas are wise public policy and whether they are permissible under the "equal protection component" of the Fifth Amendment. However, because it is not the purpose of the sponsors of the bill to require quotas, the following discussion will assume a common agreement that a bill mandating them would be inadvisable.

The summary accompanying the bill suggests that the Supreme Court in *Ward's Cove* broke with eighteen years of precedent and "effectively overrule[d]" *Griggs* by requiring that "victims of discrimination . . . bear the heavy burden of proving that the employer has no legal justification for its exclusionary practices." The purported goal of the amendment is to "restor[e] the *Griggs* rule by providing that, once a person proves that an employment practice has a disparate impact, the employer must justify the practice by showing that it is based on business necessity." The summary concludes by stating that "[t]he Act does not mandate quotas in any fashion."

The proposed section 703(k) is based upon three fundamental misconceptions: (1) a misconception of what the law was prior to *Wards Cove*; (2) a misconception of the effect of *Wards Cove*; and (3) a misconception of the requirements and inevitable effects of the amendment. It is the purpose of this submission to address these three issues. At the conclusion of that discussion, I will comment briefly upon other features of the bill.

PART I: DISPARATE IMPACT

A. *Wards Cove* is not inconsistent with prior case law and in no way "effectively overruled" *Griggs*

The rule with respect to disparate-impact challenges under Title VII as described in *Wards Cove* is: (1) the plaintiff must first identify a specific practice or practices that are responsible for the disparate impact; (2) the burden of production—but not the burden of persuasion—then shifts to the employer to justify the challenged practice; (3) by showing that the practice "serves, in a significant way, the legitimate employment goals of the employer." Proponents of the amendment currently under consideration assert that each of the three steps described above constitutes a break with prior law. Although there was a split among the circuits with respect to each issue,[6] a review of each element of the above rule will demonstrate that it is fully consistent with prior case law of the Supreme Court.

1. The Plaintiff Must Identify a Specific Practice or Group of Practices Having an Identifiable Disparate Impact

In *Wards Cove*, the majority noted that part of a plaintiff's burden is to identify the specific practice or practices that produce the disparate impact. S. 2104 would eliminate that requirement by allowing the plaintiff to challenge a "group of employment practices," a phrase that is defined to include "an overall employment process." Thus, a plaintiff may recover by showing that the "overall employment process" results in a lack of proportional representation at the "bottom line." That was never the law before *Wards Cove*, and it would be a mistake now to amend the law to so provide.

All of the Supreme Court's disparate-impact cases have involved specific challenges to discrete employment practices, such as diploma requirements or standardized tests. Attacks on an employer's overall employment processes have consistently been analyzed under a disparate-treatment analysis. Indeed, in the case most direct-

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[6] *Pouncy* v. *Prudential Ins. Co.*, 668 F.2d 795 (5th Cir. 1982) (plaintiff must identify specific practices causing the impact); *Powers* v. *Alabama Dep't of Education*, 854 F.2d 1285 (11th Cir. 1988) (plaintiff need show only disparity; employer then must identify practices that caused result); *Croker* v. *Boeing Co.*, 662 F.2d 975, 991 (3d Cir. 1981) (en banc) (burden of persuasion remains with plaintiff at all times); *Segar* v. *Smith*, 738 F.2d 1249, 1267 (D.C. Cir. 1984) (once disparate impact of a particular practice is shown, the burden of persuasion shifts to employer); *Contreras* v. *City of Los Angeles*, 656 F.2d 1267 (9th Cir. 1981), cert. denied, 455 U.S. 1021 (1982) (Supreme Court's disparate-impact cases approve "employment practices that significantly serve, but are neither required by nor necessary to, the employer's legitimate business interests"); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971) ("The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business.").

Significantly, most cases that adopt one element of the proposed section 703(k) will reject others, perhaps recognizing that a combination of all three elements will place an impossible burden on the employer. Thus, for example, while *Powers* allowed the plaintiff to establish a prima facie case merely by showing disparity, it permitted the defendant to rebut that showing by establishing job-relatedness. Similarly, while *Segar* placed the burden of persuasion on the defendant, it required the plaintiff to challenge specific practices.

ly on point, *Furnco Construction Corp.* v. *Waters*,[7] the Court specifically held that where plaintiffs challenged an employer's hiring processes, which involved delegating hiring responsibilities to a supervisor who hired mostly former employees who had worked for him before, the case should be analyzed as a disparate-treatment case rather than as a disparate-impact case. The Court distinguished cases such as *Griggs* and *Albemarle Paper Co.* v. *Moody*,[8] on the ground that they involved employment tests or "particularized requirements." [9]

The notion that Title VII has always permitted "bottom line" disparate-impact challenges is also inconsistent with the "pattern and practice" cases, such as *Teamsters* v. *United States* [10] and *Hazelwood School District* v. *United States*.[11] *In both, the United States attempted to support its claims of intentional discrimination by relying upon statistical disparities. In rejecting the defendant's argument in Teamsters* that a violation of Title VII could not be based on statistics, the Court made the following observation, which is wholly at odds with the "bottom line" disparate-impact challenge:

> [T]he statistical evidence was not offered or used to support an erroneous theory that Title VII requires an employer's work force to be racially balanced. *Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination*; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of longlasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though section 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population.

The Court in *Teamsters* thus made clear that imbalance by itself does not violate Title VII. Similarly, in *Segar* v. *Smith*,[12] the D.C. Circuit compared pattern-or-practice cases, in which the plaintiffs challenge "the employment system as a whole" as being intentionally discriminatory and disparate-impact cases, in which plaintiffs "challenge the disparate impact of specific employment practices." If it were sufficient to show that the overall result of the hiring process is disproportionate, there would be no need to consider whether the disparity is a consequence of intentional discrimination, especially if, as opponents of *Wards Cove* argue, the defendant's burden is significantly higher in an impact case than in a treatment case.

Not only has the Supreme Court never permitted disparate-impact challenges based upon the bottom line, the Courts of Appeals had been similarly reluctant. The leading case is *Pouncy* v. *Prudential Insurance Co.*,[13] in which the plaintiff had argued that a number of employment practices had resulted in concentration of blacks in lower level position. The Fifth Circuit rejected this claim, stating that the disparate-impact theory is not "the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices." [14] In an article that appeared prior to the controversy engendered by *Watson* and *Wards Cove*, Professor George Rutherglen of the University of Virginia characterized this holding of *Pouncy* as being relatively noncontroversial. In fact, he observed, "[a]ll of the circuits apparently agree with this holding." [15]

There is also a substantial anomaly in recognizing a bottom-line disparate-impact claim, given that a defendant cannot escape liability in a disparate-impact challenge by demonstrating balance at the bottom line. In *Connecticut* v. *Teal*,[16] the Court held that where a plaintiff demonstrates that one step in the hiring or promotion process has a disproportionate effect on minorities, the employer cannot defend by showing that there is balance at the bottom line.

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[7] 438 U.S. 567 (1978).
[8] 422 U.S. 405 (1975).
[9] 438 U.S. at 575 & n.7.
[10] 431 U.S. 324 (1977).
[11] 433 U.S. 299 (1977).
[12] 738 F.2d 1249, 1266 (D.C. Cir. 1984).
[13] 668 F.2d 795 (5th Cir. 1982).
[14] *Id.* at 801.
[15] Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 Va. L. Rev. 1297, 1339 & n.175 (1987) (citing *Atonio* v. *Wards Cove Packing Co.*, 810 F.2d 1477, 1485 (9th Cir. 1987) (en banc); *Rossini* v. *Ogilvy & Mather Inc.*, 798 F.2d 590, 605 (2d Cir. 1986); *Griffin* v. *Board of Regents*, 795 F.2d 1281, 1288–89 (7th Cir. 1986); *Robinson* v. *Polaroid Corp.*, 732 F.2d 1010, 1014 (1st Cir. 1984); *Mortensen* v. *Callaway*, 672 F.2d 822, 824 (10th Cir. 1982).
[16] 457 U.S. 440 (1982).

In sum, the Supreme Court in no way deviated from its prior precedents in holding that a plaintiff bears the burden of identifying the practice or practices responsible for the impact and demonstrating the causal relationship between the two.

2. Once the Plaintiff Has Established a Prima Facie Case of Disparate Impact, only the Burden of *Production Shifts to the Employer*

In *Wards Cove*, the Supreme Court resolved a conflict that existed in the lower courts concerning the nature of the employer's burden once a disparate impact is shown. Contrary to the opinion of Justice Stevens, the Supreme Court had never clearly articulated whether the employer's burden is one of production or persuasion, but the Court's ultimate resolution of the question is consistent with its earlier cases, as well as with the development of the issue under the disparate-treatment analysis.

As Justice Stevens observed in *Wards Cove*, the Court in its earlier opinions had described the employer's burden as one of "demonstrating," "proving," or "showing" job-relatedness. In footnote 14, Justice Stevens stated:

> See McDonnell Douglas, 411 U.S., at 802, n. 14. See also, e.g., Teal, 457 U.S., at 446 ("employer must . . . *demonstrate* that 'any given requirement [has] a manifest relationship to the employment in question' "); New York City Transit Authority v. Beazer, 440 U.S. 568, 587 (1979) (employer "*rebutted*" prima facie case by "*demonstration* that its narcotics rule . . . 'is job related' "); Dothard v. Rawlinson, 433 U.S. 321 (1977) (employer has to "*prov[e]* that the challenged requirements are job related"); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (employer has "burden of *proving* that its tests are 'job related' "); Griggs, 401 U.S., at 432 (employer has "burden of *showing* that any given requirement must have a manifest relationship to the employment"). (ellipses and brackets in original; emphasis added).

Significantly, Justice Stevens, who was attempting to make the best case that the prior law contemplated a shifting of the burden of persuasion, was unable to point to a single instance in which the Court had described the employer's burden as one of persuasion. Although Justice Stevens seems to assume that the words "demonstrate," "prove," and "show" describe the burden of persuasion, the discussion below reveals the falsity of that assumption.

In many ways, the evolution of the burden-of-proof issue under *Griggs* parallels the evolution of the same issue under the disparate-treatment theory of *McDonnell Douglas*. In *McDonnell Douglas*, the Court held that in a disparate-treatment cage, once the plaintiff has established a prima facie case, "[t]he burden then must shift to the employer to *articulate* some legitimate, nondiscriminatory reason for the employee's rejection." It suggested that such an articulation would "*rebut*" the employee's prima facie case and "*discharge the [employer's] burden of proof.*" Later, in *Furnco Construction Corp.* v. *Waters*, the Court described the burden that shifts to the employer as one of "*proving* that he based his employment decision on a legitimate consideration." In dissent in *Furnco*, Justice Marshall, joined by Justice Brennan, compared the employer's burden of proof under *McDonnell Douglas* and *Griggs*. In a disparate-treatment case, "the burden shifts to the employer who must prove that he had a 'legitimate nondiscriminatory reason for the [plaintiff's] rejection' "; in a disparate-impact case, "the burden shifts to the employer to *show* that the practice has 'a manifest relationship to the employment in question.' " To the extent that there is a difference in these two standards, certainly the burden of "showing" cannot be greater than the burden of "proving." Thus, Justice Marshall must be saying that the burden placed upon the employer in a disparate-impact case is no greater, and is perhaps less, than the burden on the employer in a disparate-treatment case.

Subsequently, in *Board of Trustees of Keene State College* v. *Sweeney*, the Supreme Court reversed a decision of the First Circuit that had held that the employer's burden was to "prove absence of discriminatory motive." The Court noted:

> While words such as "articulate," "show," and "prove," may have more or legs similar meanings depending upon the context in which they are used, we think that there is a significant distinction between merely "articulat[ing] some legitimate, nondiscriminatory reason" and "prov[ing] absence of discriminatory motive."

Thus, the Court acknowledged that the words "show" and "prove" may refer either to a production burden or a persuasion burden. Justice Stevens, dissenting in *Sweeney*, took issue with the majority's conclusion that "prove" and "articulate" mean something different and argued that the Court of Appeals did not shift the burden of persuasion by requiring the employer to "prove" absence of discriminatory motivation. He asserted that "when an executive takes the

witness stand to 'articulate' his reason, the litigant for whom he speaks is thereby proving those reasons." Justice Stevens stated:

> Whether the issue is phrased in the affirmative or negative, the ultimate question involves an identification of the real reason for the employment decision. On that question—as all of these cases make perfectly clear—*it is only the burden of producing evidence of legitimate nondiscriminatory reasons which shifts to the employer*; the burden of persuasion, as the Court of Appeals properly recognized, remains with the plaintiff.

Even with this relatively clear articulation of a rule shifting only the burden of production, but not the burden of persuasion, lower courts continued to disagree over the nature of the employer's burden.[17] As a result, the Court was required to revisit the question in *Texas Dept. of Community Affairs* v. *Burdine*.[18] There, the Court unequivocally held:

> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reason. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity.

The above discussion reveals with great clarity that an assertion that the Supreme Court's decisions have consistently placed the burden of persuasion on the employer cannot be based upon the mere quotation of words such as "demonstrate," "prove," and "show." Those same words were used in the disparate-treatment context and were held to denote the employer's burden of production, not persuasion.

Fundamentally, the question of whether the burden that shifts is one of persuasion or one of production depends upon what constitutes the "wrong" in a disparate-impact case. If the wrong is, as Justice Stevens seems to suggest, that an employer has a work force that is "out of balance," then arguably it makes sense to say that an employer may attempt to prove the "affirmative defense" of "business necessity." The affirmative defense is simply an act of grace by Congress.[19] However, if the wrong is the placement of arbitrary barriers (that is, barriers that are not job related) in the way of minority advancement, as *Griggs* held, then showing that the barrier is in fact arbitrary is part of the *plaintiff's* case.[20]

It also makes little sense to say that an employer's rebuttal burden is greater where the allegation is that its actions were not intended to be discriminatory than in circumstances where the allegation is of intentional discrimination. In disparate-treatment cases, the prima facie case "raises an inference of discrimination . . . because we presume these acts if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." [21] Despite the fact that the *McDonnell Douglas* prima facie case shows that it is more likely than not that the employer engaged in illegal discrimination, there is no shifting of the burden of persuasion. *A fortiori*, in an impact case there should be no shifting of the burden of persuasion, since the prima facie case shows only imbalance; it does not show that it is more likely than not that the impact is an impermissible one.

It should be emphasized that the Supreme Court was not really free to adopt a rule that the burden of persuasion shifts to the employer. A contrary rule was strongly implied by Congress in 1964, when it established in section 703(j) that a lack of proportional representation does not violate Title VII:

> Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or group . . . on account of an imbalance which may exist with respect to the total number or

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[17] *Compare Lieberman* v. *Grant*, 630 F.2d 60 (2d Cir. 1980) (burden of production); *Jackson* v. *United States Steel Corp.*, 624 F.2d 436 (3d cir. 1980) (same) with *Vaughn* v. *Westinghouse Electric Corp.*, 620 F.2d 655 (8th Cir. 1980) (burden of persuasion); *Burdine* v. *Texas Dept. of Community Affairs*, 608 F.2d 563 (5th Cir. 1979) (same).

[18] 450 U.S. 248 (1981).

[19] Justice Blackmun's view of this issue is also apparently skewed by his interpretation of what the "wrong" is. In his opinion in *Watson*, he suggested that "numerical disparity" is itself "an improper effect."

[20] Of course, the plaintiff's presentation is facilitated by the employer's obligation to come forward with evidence of justification, so that the plaintiff need not preemptively rebut all conceivable justifications.

[21] *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 577 (1978).

> percentage of persons of any [protected class] in comparison with the total number or percentage of persons of such [protected class] in . . . the available work force. . . .

Why are employers not required to grant preferential treatment to remedy an imbalance in the work force? Because an imbalance in itself does not violate Title VII, nor, unlike a *McDonnell Douglas* prima facie case, does an imbalance show that impermissible discrimination has probably occurred. Thus, the Supreme Court properly left the burden of persuasion on the plaintiff, where it belongs.

3. The Test of "Business Necessity" under *Griggs* Requires only that the Practice Be Job Related or Substantially Serve a Legitimate Employer Goal

Much of the confusion over the nature of the employer's justification of a challenged practice derives from the *Griggs* Court's use of the phrase "business necessity," a phrase that is not self-defining and that has been misunderstood, not by the Supreme Court, but by those who wish to distill the holding of *Griggs* into as few words as possible. The term "business necessity," which the Court used in *Griggs* as a shorthand expression, seems to have assumed a talismanic significance. A more thorough examination of both the analysis and language of *Griggs* reveals that the Court did not lay down a test of strict "necessity," but rather a test of "job relatedness," a test that is preserved by *Wards Cove*.[22]

Griggs involved a challenge to a requirement of a high school education and satisfactory score on two professionally prepared aptitude tests as a condition of obtaining any number of mostly blue-collar positions with Duke Power Company. Prior to the effective date of Title VII, Duke Power had an open policy of racial discrimination, but it modified its employment requirements when Title VII became effective. The Supreme Court observed that the lesser performance of blacks was a consequence of their "inferior education in segregated schools" and that the diploma and test requirements tended to " 'freeze' the status quo of prior discriminatory employment practices." Because these requirements "cannot be shown to be related to job performance," they were improper. Introducing the phrase "business necessity" into the law of Title VII, the Court stated:

> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. *The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.*

The phrase "related to job performance" is key to the analysis of *Griggs*. The Court in *Griggs* did not hold that testing requirements were permissible only if the employer could not run its business without them or if effective job performance was impossible without them. Instead, it held that they could not be used unless they were "job related." If they were job related, they satisfied the test of "business necessity." The Court's opinion reveals that its concern was with the imposition of arbitrary requirements unrelated to the prediction of job performance that tended to exclude minorities. For example, the following statements appear in *Griggs*:

—"If an employment practice which operates to exclude Negroes cannot be shown to be *related to job performance*, the practice is prohibited."

—"On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a *demonstrable relationship to successful performance of the jobs for which it was used.*"

—"Both were adopted . . . without meaningful study of their *relationship to job-performance ability.*"

—"Congress has placed on the employer the burden of showing that any given requirement must have *a manifest relationship to the employment in question.*"

—"The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines interpreting section 703(h) to permit only the use of *job-related tests.*"

—"The [EEOC] guidelines demand that employers using tests have available 'data demonstrating that the test is *predictive of or significantly correlated with important elements of work behavior . . .*' "

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[22] *See also Hamer* v. *City of Atlanta*, 872 F.2d 1521, 1533 (11th Cir. 1989) ("Business necessity is closely akin to job-relatedness and the terms are often interchanged.").

—"Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What congress has forbidden is giving these devices and mechanisms controlling force *unless they are demonstrably a reasonable measure of job performance.*"

—"What Congress has commanded is that any tests used must *measure the person for the job* and not the person in the abstract." (emphasis added).

In contrast to the repeated references to job-relatedness, the phrase "business necessity," upon which the critics of *Wards Cove* seize, is mentioned but once and then in conjunction with the job-relatedness concept. Thus, it is clear from *Griggs* clear what "business necessity" requires: the challenged practice must be job related, rather than arbitrary.[23]

If the Court in *Griggs* meant, as section 703(k) would mean, that a selection device must be "essential to effective job performance," it is curious that in no case has the Court ever held that a selection device that was in fact "job related" was nonetheless infirm because it was not "essential." Instead, the Court has consistently inquired whether a challenged requirement was related to the job. Indeed, Justice Stevens' dissent in *Wards Cove* neatly summarizes what kind of a showing the Court has required. In addressing a different point—whether the employer's burden is one of production or persuasion—Justice Stevens included the following footnote, which is also set forth in the prior section but with different emphasis:

> See McDonnell Douglas, 411 U.S., at 802, n. 14. See also, e.g., Teal, 457 U.S., at 446 ("employer must . . . demonstrate that 'any given requirement [as] *a manifest relationship to the employment in question*' "); New York City Transit Authority v. Beazer, 440 U.S. 568, 587 (1979) (employer "rebutted" prima facie case by "demonstration that its narcotics rule . . . 'is *job related*' "); Dothard v. Rawlinson, 433 U.S. 321 (1977) (employer has to "prove that the challenged requirements are *job related*"); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (employer has "burden of proving that its tests are '*job related*' "); Griggs, 401 U.S., at 432 (employer has "burden of showing that any given requirement must have *a manifest relationship to the employment*"). (ellipses and brackets in original; emphasis added).

Justice Stevens' consistent repetition in footnote 14 of the "job relatedness" standard makes puzzling his profession of astonishment a few pages leter at the majority's rejection of a requirement that the practice be "essential." The only support that he provides for his suggestion that a practice with a disparate impact must be essential is a quotation from *Dothard* v. *Rawlinson* that he had to modify in order to create support for his view. Justice Stevens stated in his *Wards Cove* dissent:

> Later, we held that prison administrators had failed to "rebu[t] the prima facie case of discrimination by showing that the height and weight requirements are . . . essential to effective job performance" *Dothard* v. *Rawlinson*, 433 U.S. 321, 331 (1977).

A look at the actual passage in *Dothard* reveals a very different thought:

> We turn, therefore, to the appellants' argument that they have rebutted the prima facie case of discrimination by showing that the height and weight requirements are *job related*. These requirements, *they say*, have a relationship to strength, a sufficient but unspecified amount of which is *essential to effective job performance* as a corrections counselor.

The *Dothard* Court then continued, "If the *job-related* quality that appellants identify is bona fide, their purpose could be achieved by adopting and validating a test for applicants that measures strength directly." Thus, the Court held, if the employer could show that strength was related to the job—not "essential" to the job—it would be permissible to impose a strength requirement.[24]

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[23] *See also Connecticut* v. *Teal*, 457 U.S. 440 (1982) (Title VII violated by "nonjob-related barrier" with disparate impact); *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975) (the message of both the EEOC guidelines and the *Griggs* case is that discriminatory tests "are impermissible unless shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with important elements of work behavior.' ").

[24] Footnote 14 in *Dothard* is not to the contrary. That footnote rejects the argument that public employers should be granted greater deference than private employers, and it reads in part:

Continued

Justice Stevens' dissent in *American Tobacco Co.* v. *Patterson* also reflects an understanding of the business necessity" requirement that is much different from his exposition in *Wards Cove*. In *American Tobacco*, he argued that *Griggs* should be applied in attacks against seniority systems, a position rejected by both the majority in *American Tobacco* and the bill under consideration. Justice Stevens stated:

> The Court's strained reading of [section 703(h)] may be based on an assumption that if the *Griggs* standard were applied to the adoption of a post-Act seniority system, most post-Act systems would be unlawful since it is virtually impossible to establish a seniority system whose classification of employees will not have a disparate impact. *If the initiation of a new seniority system—or the modification of an existing system—is substantially related to a valid business purpose. The system is lawful.* "The touchstone is business necessity." *Griggs, supra,* at 431; cf. *New York Transit Authority* v. *Beazer,* 440 U.S. 568, 587.

Thus, Justice Stevens' understanding of what *Griggs* required is remarkably similar to the test contained in *Wards Cove*: "substantially related to a valid business purpose" in the former, and "serves, in a significant way, the legitimate employment goals of the employer" in the latter.

The requirement of strict necessity was also rejected by the Court in *Beazer* in an opinion, ironically enough, written by Justice Stevens. In that case, the Court considered a disparate-impact challenge to exclusion of methadone users under the New York Transit Authority's anti-narcotics policy. There, the Court observed:

> Finally, the District Court noted that [the Transportation Agency's "legitimate employment goals of safety and efficiency"] are *significantly served by—even if they do not require*—TA's rule. . . . The record thus demonstrates that TA's rule bears a "manifest relationship to the employment in question."

Similarly, in *Washington* v. *Davis*, the Court upheld use of a verbal ability test on the ground that "some minimum verbal and communicative skill *would be very useful, if not essential*, to satisfactory progress in the training regimen." [25] The test was valid because of "a positive relationship between the test and training-course performance." Justice Stevens, concurring, again demonstrated his understanding of the *Griggs* rule. He explained his belief that the tests were valid, as follows:

> [T]he test serves the *neutral and legitimate purpose* of requiring all applicants to meet a uniform minimum standard of literacy. Reading ability is *manifestly relevant* to the police function.

The test was valid because of "a correlation between success on the test and success in the training program." Again, this is not the language of strict business necessity. Even Justice Brennan, in dissent in *Washington* v. *Davis*, did not take issue with the majority's view that the correct inquiry was whether a correlation existed between the test scores and performance. Instead, he simply argued that it was impermissible to rely upon the correlation between the test scores and training-program performance without a showing that there was a correlation between training-program performance and later job performance:

> There is no proof that the recruits average is *correlated with job performance* after completion of training. And although a positive relationship to the recruits' average might be sufficient to validate Test 21 if the average were proved to reflect mastery of material on the training curriculum that was in turn demonstrated to be relevant to job performance, the record is devoid of proof in this regard.
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Thus for both private and public employers, "[t]he touchstone is business necessity," *Griggs*, 401 U.S., at 431, 91 S.Ct., at 853; a discriminatory practice must be shown to be *necessary to safe and efficient job performance* to survive a Title VII challenge.

The term "necessary" is used in the context of the discussion of *Griggs*, which as described previously makes clear that the test is job-relatedness. Moreover, this footnote comes in a paragraph that begins:

We turn, therefore, to the appellants' argument that they have rebutted the prima facie case of discrimination by showing that the height and weight requirements are *job related.*

If the Court were truly holding that the test is one of strict necessity, the sentence following the one quoted immediately above should have said: "Even if they have made a showing that the requirements are job related, that is no defense because the standard is one of strict necessity." However, the Court did not do that. Instead, it went on to discuss whether the defendants had shown that the requirement was job related.

[25] Although *Washington* v. *Davis* was not technically a Title VII case, the Court assumed that Title VII standards would apply.

> Sound policy considerations support the view that, at a minimum, petitioners should have been required to prove that the police training examinations either *measure job-related skills or predict job performance.*

The Court's consistent view that the standard is whether the challenged practice is job related is compelled by the legislative history of Title VII. In the influential interpretive memorandum of Senators Clark and Case, they said:

> There is no requirement in Title VII that employers abandon bona fide qualifications tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance.

110 Cong. Rec. 7213 (1964). These are not the words of "strict business necessity." See also *Contreras* v. *City of Los Angeles*, 656 F.2d 1267 (9th Cir. 1981), cert. denied, 455 U.S. 1021 (1982) (Supreme Court's disparate-impact cases approve "employment practices that significantly serve, but are neither required by nor necessary to, the employer's legitimate business interests").

Justice Blackmun, who joined Justice Stevens' dissent in *Wards Cove*, himself once took a very different view from the view that the dissent suggests has always been the law. In *Albermarle Paper*, the Court applied the EEOC Guidelines on employee testing and held that the employer's validation study was defective. Justice Blackmun declined to join the majority opinion because of what he perceived as the majority's overreliance on the stringent guidelines:

> I cannot join, however, in the Court's apparent view that absolute compliance with the EEOC Guidelines is a sine qua non of pre-employment test validation. . . . The simple truth is that pre-employment tests, like most attempts to predict the future, will never be completely accurate. We should bear in mind that pre-employment testing, *so long as it is fairly related to the job skills or work characteristics desired*, possesses the potential of being an effective weapon in protecting equal employment opportunity because it has a unique capacity to measure all applicants objectively on a standardized basis.

Then, in a prescient warning concerning an overly strict standard of justification, Justice Blackmun stated:

> I fear that a too-rigid application of the EEOC Guidelines will leave the employer little choice, save an impossibly expensive and complex validation study, but to engage in a subjective quota system of employment selection. This, of course, is far from the intent of Title VII.

In *Watson* v. *Fort Worth Bank & Trust*, Justice Blackmun again described his view of the law: "The criterion must directly relate to a prospective employee's ability to perform the job effectively."

Further evidence that the standard of "business necessity" contained in S. 2104 is at variance with existing law lies in the treatment of "less discriminatory alternatives." Under pre-*Wards Cove* case law, once the defendant has shown that the challenged practice is job related, the plaintiff may still prevail if there are alternatives having less adverse impact. Fifteen years ago, in *Albermarle Paper*, the Court clearly placed on the plaintiff the burden of showing such alternatives.[26] In *Wards Cove*, the Court reaffirmed that rule. Although S. 2104 is silent with respect to which party bears that burden, by defining "business necessity" to mean "essential to effective job performance," Congress necessarily places the burden on the defendant to show that there are no alternatives that would have a lesser impact. That is, if there exists an alternative with a lesser impact, then the alternative having the greater impact cannot be said to be "essential."[27] It makes no sense to suggest that the Court had always required that the practice be essential but had placed the burden on the plaintiff to identify less-discriminatory alternatives.

In sum, the assertion of the *Wards Cove* dissent that *Griggs* required that a practice with a disparate impact be "necessary to the operation of business" or "essen-

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[26] 422 U.S. at 425, 436.

[27] *See, e.g., Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 798 n.7 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971) ("It should go without saying that a practice is hardly 'necessary' if an alternative practice better effectuates the intended purpose or is equally effective but less discriminatory.").

tial to effective job performance" is belied by the case law, including several opinions authored by the *Wards Cove* dissenters.

The question still remains, however, whether the *Wards Cove* formulation of the standard—that the challenged practice must "serv[e], in a significant way, the legitimate employment goals of the employer"—differs from the standard of "job-relatedness" previously articulated by the Court. The Court in *Wards Cove* did not appear to believe that it was announcing a new standard; instead, it stated that it had "phrased the query differently in different cases," but the fundamental question remains the same. However, if the Court was not announcing a new standard, why did it use different terminology?

The answer to the above question lies in the nature of the practices challenged in *Wards Cove*. Prior to *Watson*, the disparate-impact cases decided by the Supreme Court involved challenges to measurements or requirements that the employer used as a proxy for future job performance. For example, *Griggs*, *Albermarle Paper*, *Teal*, and *Washington* v. *Davis* involved challenges to paper-and-pencil tests; *Beazer* involved a challenge to a no-narcotics rule; *Dothard* involved a height-and-weight requirement for prison guards. The question in these cases was whether the employers' requirements were related to the jobs for which the employers were hiring. *Watson* and *Wards Cove*, on the other hand, were different. They involved challenges to hiring and promotion *procedures*, rather than *qualifications*. *Watson* reviewed a challenge to a bank's practice of relying upon the subjective judgments of supervisors acquainted with candidates for promotion; *Wards Cove* reviewed a challenge to a series of hiring and promotion practices, such as nepotism, a rehire preference, a lack of objective hiring criteria, separate hiring channels, and a practice of not promoting from within. How could such practices be defended under the rubric of "job-relatedness"? Obviously, they could not; no practices could, no matter how reasonable. The employer may have significant legitimate interest in using these practices, but it is nonsensical to debate whether they are "job-related." Had the Court in *Wards Cove* described the test in terms of relationship to the job, it would have been providing the lower court with a test that could not be applied rationally on remand.

As noted above, the Court's opinion in *Wards Cove* was not the first to describe the test in this way. For example, in *Beazer*, the Court stated that a practice is justified under *Griggs* where "legitimate employment goals . . . are significantly served by—even if they do not require" the practice. Similarly, as described above, when Justice Steven addressed the application of *Griggs* to a process (a seniority system), rather than to job qualifications, he described the test in terms similar to those used by the majority in *Wards Cove*: "substantially related to a valid business purpose." The Ninth Circuit couched the standard in a similar fashion in *Contreras* v. *City of Los Angeles*,[28] describing as legitimate "employment practices that significantly serve, but are neither required by nor necessary to, the employer's legitimate business interests."

B. *Wards Cove* did not require the employee to prove the "negative" that the employer had no legitimate justification for the practice

If *Wards Cove* had actually held what many of its critics suggest that it did, the uproar over the decision might be more understandable. The position articulated in the summary of the bill is that under *Wards Cove*, "victims of discrimination must bear the heavy burden of proving that the employer has no legal justification for its exclusionary practices."[29] Other critics have argued that *Wards Cove* places on plaintiffs the impossible burden of proving a negative. Similarly, a New York Times editorial recently characterized *Wards Cove* as requiring the plaintiff to prove that a practice having a disparate impact is "utterly unreasonable."

At the risk of redundancy, the holding of *Wards Cove* was nothing of the sort. *Wards Cove* simply requires the plaintiff to *identify* the practice responsible for the disparate impact. Once the plaintiff does so, the employer *loses* unless it satisfies the burden of producing evidence to demonstrate that the practice "serves, in a significant way its legitimate employment goals." Moreover, not just any justification by the employer will suffice, for the Court has emphasized that "[a] mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly

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[28] 656 F.2d 1267 (9th Cir. 1981), cert. denied, 455 U.S. 1021 (1982).

[29] In a sense, this very characterization shows just how far the current bill alters the perspective of Title VII. Characterizing persons who have been adversely affected by practices with disparate impact as "victims of discrimination" where there is no showing that the practices are arbitrary constitutes a substantial departure from *Griggs*.

neutral employment practices." Thus, the employer may not simply assert that it had a business justification; as in disparate-treatment cases, the employer's explanation must be "clear and reasonably specific." [30] The plaintiff need not combat every conceivable justification for the employer's practice, as some of the critics of *Wards Cove* argue; instead, he need attack only the justification actually offered by the employer.

Some have argued that the burden on the employer is unduly light. For example, the amicus brief of the AACP Legal Defense and Education Fund, et al., in *Wards Cove* argued that were the Court to adopt the rule that it did.

> The employer's burden would be reduced to such an extent that all but the most unimaginative employers—unable even to articulate a legitimate reason for practices having a significant adverse impact—would be able to rebut a showing of disparate impact discrimination, no matter how compelling.

That is simply not a realistic concern. While it is true that the employer may rebut the prima facie case by presenting evidence that the challenged practice substantially serves its legitimate employment goals, that is not the end of the lawsuit. Even if the prima facie case is rebutted, the plaintiff may still prevail by demonstrating the existence of alternative practices with lesser adverse impact. If the employer does what *Wards Cove* critics suggest employers will do—come forward with a flimsy justification—then the plaintiff should have an easy time demonstrating the existence of appropriate alternatives.

C. Section 703(k) Will Require Employers to Use Quotas to Avoid Imbalance in the Workplace

The standard of "business necessity" created by section 703(k)—"essential to effective job performance"—is a very difficult standard to meet. Whenever an employer's hiring or promotion practices deviate from proportional representation, the employer must meet this difficult standard. If it fails to do so, it is liable to the plaintiff for, at the least, backpay and attorneys fees; it is also responsible for its own attorneys fees, which can be quite substantial in such cases; in addition, it must endure the stigma of having engaged in illegal discrimination, no small penalty in today's climate. All of these consequences create a substantial incentive for an employer to ensure that its hiring or promotion practices do not subject it to such lawsuits—that is, that it does not deviate from proportional representation. As Professor Rutherglen has persuasively argued, placing a heavy burden on defendants "would, in effect, prevent hidden discrimination only by requiring reverse discrimination." [31] Thus, the employer is virtually compelled by law to engage in affirmative action.

How, given the above analysis, can section 703(k) not require quotas? Only two arguments work. First, the argument might be that the prospect of an adverse judgment will not affect employer behavior, a proposition so unlikely that it requires little elaboration, since if the consequences of an adverse judgment were so slight, it is hard to understand why a profit-maximizing employer would spend so much in attorneys fees to avoid the consequences of such a judgment. Second, the argument might be that the burden placed on the employer is modest enough that it can be satisfied reasonably easily. However, the proponents of the Civil Rights Bill do not argue that the burden imposed on employers will be a small one; to the contrary, their argument is that the *Wards Cove* burden is far too small, and they seek to modify that outcome. In any event, even with assurances that the "business necessity" burden is a small one, such assurances cannot overcome the clear statutory command: an employment qualification must be "essential to effective job performance," and that command must be interpreted in light of the injunction of section 11 of the bill, which requires that it be "broadly construed to effectuate the purpose of the laws to eliminate discrimination and provide effective remedies."

That the standard of "business necessity" created by the bill is an onerous one is further demonstrated by comparing it to the standard for a "bona fide occupational qualification" (BFOQ) under Title VII, a standard that is quite similar in articulation. Section 703(e) of Title VII provides that an employment decision based on religion, sex, or national origin does not violate Title VII where religion, sex, or national origin "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." Although the phrases "reasonably necessary" and "normal operation" might make it appear that the BFOQ standard is not draconian—and, it should be emphasized, "reasonably necessary" would appear to be a lesser standard than "essential"—the BFOQ exception

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[30] *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981).
[31] Rutherglen, *supra* note 15, at 1315.

has been held to be an "extremely narrow exception" to Title VII's prohibition of sex discrimination.[32] Given the paucity of cases upholding the BFOQ defense, it is difficult to believe that very many employment practices will be held justified by "business necessity."

What does it mean to say that a qualification must be "essential to effective job performance"? The natural reading of the language is that without that qualification, effective job performance is impossible. Thus, if an employer requires a minimum score on a standardized test that has a disparate impact, the employer is liable unless it can show that effective job performance would not be possible from a person with a test score below the cutoff. If an employer of secretaries requires a typing speed of 60 words per minute, it must be prepared to show two things: first, that a secretary cannot be effective unless a skilled typist, and, second, that a typist with a speed of 59 words per minute cannot provide effective performance.

Rather than merely considering the standard in the abstract, it might be useful to consider another example. Assume that a law firm—or any other entity employing lawyers—wishes to hire new lawyers, and, assume that it is an employer considered desirable enough that it can afford to be picky. How does it make its hiring decision? The only absolutely required qualifications are graduation from an accredited law school and admission to the state bar. The firm accepts resumes from anyone with those qualifications. Other factors considered by the employer are: (1) law school grade: (2) the prestige of the law school attended; (3) whether the applicant was on law review; (4) work experience both before and during law school; (5) interest in areas of the firm's practice, as demonstrated by relevant courses taken in law school and employment during law school; (6) recommendations by law professors and former employers; (7) affirmative action preference; and, finally, (8) a personal interview, in which such attributes as verbal facility, assertiveness (at least with respect to some kinds of practice), and compatibility with other employees, both professional and support staff.

The ultimate decision is made by a small number of people, all of whom sit in on the interview. They consider all of the factors, but do not assign numerical weight to any, and no factor is an automatic disqualifier. Competition for positions is strong, and the firm receives many more applicants than it has positions. Despite the affirmative action preference, the employer hires only 6 percent minorities despite a 12 percent availability in the pool of recently-graduated licensed attorneys.

A disappointed minority applicant brings suit under Section 703(k) of the Civil Rights Act of 1990. How does he fare? First, has he established a prima facie case? It would certainly appear so, although despite the additional definitions in the bill, the term "disparate impact" is not among them. The plaintiff can show that the "overall employment process" excludes minorities at a disproportionately high rate. Given the absence of any requirement that the plaintiff identify the specific practices having an adverse impact, there appears to be no further burden placed upon him.

Next, what is the employer's burden? Under the bill, it would be to show that "something" is "essential to effective job performance." What does it have to show? That the hiring *process* was essential? That it could never show; there is a virtually unlimited number of ways to hire lawyers. Must the employer then show that the *qualifications* were essential? Which qualifications? Must every attribute the employer deems relevant on any resume actually be "essential"? Although the hiring process described above can hardly be considered irrational, it is unlikely that any one of the factors described above is "essential to job performance." There are certainly very capable lawyers who received poor grades in law school, never served on law review, and have the charisma of a ferret. But if it is not enough to show that the qualifications are "related to" effective job performance, even if not "essential" to it, how is the employer to defend against the disparate-impact challenge? The answer is that it cannot. The only way that it can avoid liability is to avoid the disparate impact in the first place. That is, the affirmative action preference that the hypothetical employer has already provided must be increased. A result more in conflict with section 703(j)'s provision that nothing in Title VII is to be interpreted to require preferences can hardly be imagined.

Lest it be thought that a "straw man" is being set up, because the example provided deals with the hiring of professionals, it should be noted that the same analysis applies to virtually any "complex" job, that is, a job that entails a series of responsibilities, especially those requiring the exercise of judgment. For example, consider the process involved in hiring a secretary. Although the job category of "secre-

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[32] *Dothard*, 433 U.S. at 334.

tary" is not ordinarily considered a high-status professional position, people who have had both good secretaries and bad secretaries know that there is a world of difference between the two. Moreover, the portion of that difference attributable to objective measurable criteria, such as typing speed and ability to take shorthand, is relatively small. A good secretary is a person whose judgment you depend on—someone who deals with clients or customers in your absence; someone who can keep you organized; someone who will "go the extra mile" in a pinch. A good secretary is someone who does not need to be told what to do—a "self starter." Loyalty, tact, ambition, perseverance, and a host of other qualities are important in a secretary. So, what do you do when you need a new secretary? First, an objective "screening" on the basis of mechanical skills, such as typing and spelling, will weed out a few who are totally unqualified. But what about the other qualities that you are looking for? You obtain recommendations based upon past performance; you interview candidates so you can get some estimate of the subjective qualities that you are looking for. Then, to select from the remaining available candidates, you take a deep breath and follow your best judgment. Is it scientific? No. Is it "objective"? No. Should we impose liability on an employer who selects employees in this way if it fails to hire "by the numbers"? No. But S. 2104 would do exactly that.

Which of the foregoing criteria are essential to effective job performance of a secretary? Perhaps the minimal mechanical skills would be found to be "essential," but what else? Can the employer really say, "My business cannot operate without my use of interviews and recommendations"? Can the employer really say, "My business cannot operate unless I act on my subjective judgment." It is doubtful. So, what does the employer do? The only thing that it can do is to make sure that there is no disparate impact so it is never in the position of having to justify those hiring decisions to a court. And how does it do that? It ensures that its workforce mirrors the race and sex composition of the community at large.

Something about the foregoing argument should be emphasized. When the argument is made that hiring decisions are not always based upon quantifiable variables and that an undue burden should not be placed upon employers to defend their decisions, the rejoinder is often, "so you are saying that employers' decisions are so arbitrary that even they can't figure out how they made their decisions." Although a nice rhetorical point, the argument misses the mark. To say that it is impractical, if not impossible, to assign numerical values (to three decimal places) to each applicant does not mean that a decision favoring one applicant over another is arbitrary. It simply reflects a fact of life that people do not ordinarily make decisions in an entirely "quantifiable" way. Consider the most important decisions that we make in life—whom to marry, what house to buy, what school to go to. Although most of us were convinced when we made those decisions that we had very good reasons for our choices, who among us could demonstrate with scientific accuracy either how he made the decision or why he thinks that he made it correctly? Who among us believes that if he had made the decision by assigning varying numbers of positive and negative points for each attribute that was important, he would have reached a better decision or that he would at least reach consistent decisions? There is no reason to impose a greater burden on an employer, and no way for an employer to satisfy such a burden.

Many critics of the *Wards Cove* reasoning understand that the burden they wish to place upon employers is an impossible one to meet. For example, the amicus brief submitted by the Lawyers' Committee for Civil Rights Under Law in *Wards Cove* urged the Court not to impose the burden on plaintiffs to demonstrate causation, stating:

> [I]t would be impossible for plaintiffs to prove with any more specificity the causal connection between a particular subjective practice and a particular disparate impact. . . . [M]ultiple regression analysis is illsuited to deal with unquantifiable variables such as subjective hiring criteria. Indeed, it is difficult to envision any method of isolating the significance of an individual subjective practice in such a situation. . . .

The Lawyers' Committee further stated that "[e]ven to attempt such proof of specific causation is a daunting task" and reported that in an earlier disparate-impact case in which it had participated, it had been necessary to review 150,000 pages of records and to incur substantial expense. One would think that the appropriate conclusion to be reached from the foregoing is that the disparate-impact analysis is simply not appropriate to decisions based upon multiple unquantifiable variables, since the complexity of the decision makes it impossible to prove or disprove causation. If it is impossible to demonstrate exactly what caused the disparity, as the Lawyers' Committee acknowledges, it is impossible for the employer to demonstrate

the "business necessity" of the cause. Therefore, under this standard the employer automatically loses.

Finally, it should be understood that if the bill is, in effect, a requirement of quotas, there is a substantial question whether it is constitutional. Under the Equal Protection Clause of the Fourteenth Amendment, race-conscious hiring is permissible only if it is "narrowly tailored" to further a "compelling governmental interest." [33] Remedying prior discrimination is a "compelling interest; proportional representation is not. Similarly, flexible goals may be "narrowly tailored"; quotas are not. Although Congress arguably has greater power than the states in this respect,[34] Congress's authority is far from absolute. Thus, in *Fullilove* v. *Klutznick*, a minority set-aside program was upheld, but only because "Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination." Even private employers—who have greater leeway in adopting affirmative action programs than public employers—may not engage in "blind hiring by the numbers" and must limit their affirmative action efforts to remedying a "manifest imbalance" in "traditionally segregated job categories." [35]

D. *Conclusion*

The position of the *Wards Cove* majority was a sensible accommodation of the interests of both employers and employees that was fully consistent with the Court's prior precedents. The purpose of *Griggs* was not to require employers to lower their standards; rather, it was to ensure that the standards that employers set were job related. *Wards Cove* is consistent with that purpose; the Civil Rights Bill is not. The purpose of Title VII was to make race, color, national origin, religion, and sex irrelevant to employment decisions. *Wards Cove* is consistent with that purpose; the Civil Rights Bill is not. The purpose of section 703(j) of Title VII was to ensure that employers not be required to engage in quota hiring. *Wards Cove* is consistent with that purpose; the Civil Rights Bill is not.

Part II: Other Miscellaneous Provisions

A. Challenges to Consent Decrees and Seniority Systems: *Martin* v. *Wilks* and *Lorance* v. *AT&T Technologies*

In *Martin* v. *Wilks*, the Supreme Court allowed white firefighters in the City of Birmingham, Alabama, to challenge racial discrimination in promotions, notwithstanding the employer's defense that the promotion preference for blacks was contained in a consent decree settling earlier litigation. Relying upon well-established principles, the Court held that persons are not bound by judgments entered in litigation to which they were not party. As the Court stated, "this rule is part of our 'deep-rooted historic tradition that everyone should have his own day in court.'" [36]

Rule 24 of the Federal Rules of Civil Procedure, which governs intervention, allows, but does not require, interested persons to intervene in litigation. Rule 19, on the other hand, provides for mandatory joinder where a judgment rendered in the absence of a particular person may "leave . . . persons already parties subject to a substantial risk of incurring inconsistent obligations. . . ." Thus, the Court concluded, "[j]oinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree." Section 6 of the Civil Rights Bill would overturn *Martin* v. *Wilks* by imposing upon persons adversely affected by a consent decree an obligation to intervene under pain of forfeiture of their own civil-rights claims.

The antipathy of the "Civil Rights Lobby" to *Martin* v. *Wilks* is ironic. The plaintiffs in *Martin* were alleging that their right to be free from illegal racial discrimination had been violated. They had not been parties to the prior litigation, but they were told that their right to challenge the allegedly unlawful discrimination had been settled in a lawsuit to which they had not been party. There is a fundamental unfairness to that suggestion, and in other contexts such a result would be denounced as a denial of due process.

Even if there were circumstances in which it might make sense to terminate a nonparty's rights in this way because the nonparty has superior knowledge concern-

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[33] *Wygant* v. *Jackson Board of Education*, 476 U.S. 267 (1986).

[34] *Compare Fullilove* v. *Klutznick*, 448 U.S. 448 (1980) with *City of Richmond* v. *J.A. Croson*, 109 S.Ct. 706 (1989).

[35] *Johnson* v. *Transportation Agency*, 480 U.S. 616 (1987).

[36] 104 L.Ed.2d at 844 (quoting 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure sec. 4449, p. 417 (1981)).

ing his interest, typically reverse-discrimination claims do not present such circumstances. The parties to litigation certainly have at least as great, and almost always greater, knowledge of the scope of relief sought in the litigation than nonparties have. As the Court stated in *Martin*:

> [P]laintiffs who seek the aid of the courts to alter existing employment policies, or the employer who might be subject to conflicting decrees, are best able to bear the burden of designating those who would be adversely affected if plaintiffs prevail; these parties will generally have a better understanding of the scope of likely relief than employees who are not named but might be affected.

The effect of section 6 of the bill will be to make it extremely difficult for persons potentially harmed by a consent decree to vindicate their rights. If they are forced to intervene, they will face difficulties obtaining counsel, because even if their position as intervenors is vindicated, they will probably not be entitled to statutory attorneys fees. On the other hand, if they brought separate successful actions as plaintiffs, they would be so entitled. In any event, plaintiffs may not even know that their interests are being adversely affected, since their rights are cut off by Section 6 even in the absence of actual notice if "reasonable efforts were made to provide notice to interested persons."

If Congress is concerned that Rule 24 is inadequate because it does not require intervention even when a person knows that his interests might be adversely affected, a more general statutory change might be appropriate. Yet, the bill makes clear that it does not alter the standards for intervention under Rule 24; it simply alters the standards for intervention for one class of persons: reverse-discrimination plaintiffs.

Inclusion in the current bill of a proposal to overturn *Martin* v. *Wilks* seem inconsistent with the general tenor of the bill, which is to impose fewer restrictions on the ability of employees to challenge discriminatory practices. Can it be that civil-rights claims of white males are less worthy of resolution on the merits than those of everyone else?

It is difficult as a matter of policy or fairness to harmonize Section 6 of the bill, which overrules *Martin* v. *Wilks*, and Section 7(b), which overrules *Lorance* v. *AT&T Technologies. Lorance* held that the period to challenge a facially neutral seniority system allegedly adopted for discriminatory purposes begins to run from the date of adoption of the system. Under Section 7(b), the period for challenge begins to run each time the system is applied. Thus, an employee *potentially* affected by a discriminatory consent decree must intervene immediately or forfeit his statutory rights forever, even though, under some circumstances, he will not even know about the potential adverse effect. On the other hand, an employee *actually* affected by a discriminatory seniority system need not object when the discriminatory nature of the system first becomes known. Indeed, the employee need not object the first time it is applied or even the twentieth time it is applied. The employee may wait, if he chooses, until the twenty-first time that it is applied to him, and his challenge will be timely. Moreover, if one employee challenges the system, another employee may simply sit on the sidelines. If the first employee is successful, his success will inure to the benefit of the second, but if the first employee is unsuccessful, the second employee will not be precluded from bringing an identical challenge, since, under the general rule criticized by the opponents of *Martin* v. *Wilks*, the second employee's challenge will not be barred because he was not a party to the first action.

B. *Timeliness: Delaware State College* v. *Ricks*

In addition to overruling *Lorance*, Section 7 of the current bill would also overrule *Delaware State College* v. *Ricks*[37] and *United Air Lines, Inc.* v. *Evans*,[38] both of which held that where the only discriminatory conduct complained of occurred outside the period of limitations, the plaintiff' claim is timebarred even if its effects continue to be felt thereafter. Given the desire to facilitate prompt resolution of challenges to discriminatory challenges expressed in Section 6, there seems to be no reason to overturn *Evans* or *Ricks*.

The primary mischief that Section 6 would work is in nondischarge cases. Its effect in discharge cases is to increase the period for filing a charge, which in itself is inadvisable as a matter of policy. However, in cases where the employee continues to be employed, such as in failure-to-promote cases, Section 6 would continue liability virtually in perpetuity. For example, if an employee can show that he was

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[37] 449 U.S. 250 (1980).
[38] 431 U.S. 553 (1977).

denied a promotion in 1990 and that this denial was in part a consequence of a denial of a prior promotion in 1980, which in turn was a consequence of his having been discriminatorily denied admission to a training program in 1970, under Section 6 it appears that he can challenge the 1990 decision solely on the basis that there was a causal link between the 1970 discrimination and the 1990 nondiscriminatory denial. Although it may appear difficult to prove the causal sequence between the two acts, Section 5 takes care of that by allowing the plaintiff to prevail simply by showing that the earlier denial was a factor in the ultimate decision.

C. Mixed Motive Cases: *Price Waterhouse* v. *Hopkins*

Section 5 of the bill overrules the Supreme Court's unanimous conclusion in *Price Waterhouse* v. *Hopkins* that if an employment decision tainted by discriminatory motive would have come out the same way in the absence of such motive, no violation of Title VII has occurred. Although the Court was split over exactly what sort of showing was necessary and who bore the burden, every Justice rejected the position taken in Section 5 of the bill. And for good reason. Why should an employee who would have been discharged anyway be placed in a *better* position simply because one of the decisionmakers harbored some discriminatory animus? Under the current bill, even if the trier of fact concludes that the plaintiff would have been discharged anyway, and therefore no causal connection between the act and the thought exists, the plaintiff is entitled to compensatory and punitive damages, as well as attorneys fees.

There is a punitive aspect to Section 5 (as well as to Section 8, which provides for compensatory and punitive damages) that is incompatible with the overall remedial nature of Title VII. There seems no good reason to punish the employer for bad thoughts" where no one has been harmed.

Like other sections of the bill, this section will also unduly protract litigation. Without this bill, if it is apparent that there was some discriminatory animus but that the employer would have taken the same action anyway, the plaintiff and his attorney have an incentive to settle the litigation. However, under this bill, they have little incentive to settle. The plaintiff may "get lucky" before the jury and "hit big," while the attorney is guaranteed to recover attorneys fees. Of course, without this bill, a Rule 68 offer could place some of the risk of not settling on the plaintiff's attorney, but this bill also eliminates that prospect.

There is no good reason to adopt Section 5. It presents the opportunity for imposition of liability without any good reason to do so.[39] For example, in a case like *Price Waterhouse*, if 100 partners had voted on the plaintiff's partnership and the partners had been unanimous against her, she would still establish Title VII liability by showing that *a single partner* was motivated *in part* by sexual stereotypes. Similarly, an employee who is discharged because of a history of inadequate performance reviews may prevail on a Title VII claim by showing that one of the supervisors who contributed to one of the performance reviews was motivated in art by discriminatory animus. No amount of proof that the decision would have been identical without the taint of the discrimination will relieve the employer of liability.

Under the plurality standard in *Price Waterhouse*, even though the discriminatory consideration need only be a "motivating" factor, rather than a "substantial" factor, there are practical limitations on litigation. Although Justice Brennan's opinion states that "[r]emarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision," it is predictable that under his opinion such remarks often, if not usually, will be considered adequate evidence of motivation. However, the fact that the employer may prevail on the liability issue by demonstrating that the same action would be taken serves to limit litigation over relatively trivial occurrences. The current bill takes away that disincentive and can only lead to a substantial increase in litigation without achieving any tangible benefit.

D. Business Necessity Only a Defense to Disparate-Impact Claims (Sec. 703(k)(2))

Section 5 of the bill provides that the "business necessity" defense is available as a defense only to disparate impact claims. The apparent purpose of that provision is

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[39] There is an ambiguity in the drafting of the bill that makes the employer's burden unclear. The amendment to the liability portion of the statute provides that the complaining party must *demonstrate* that an impermissible consideration was a motivating factor. "Demonstrate" is a defined term and means that the party must meet the burden of production and persuasion. The amendment to the remedies portion, however, provide for a limitation of remedies in circumstance where the employer *establishes* that it would have taken the same action. "Establish" is not a defined term, so it is unclear whether its meaning is the same as the term "demonstrate."

to overrule cases such as *Auto Workers* v. *Johnson Controls, Inc.*[40] That case held that the doctrine of business necessity could be raised by an employer in defense of a fetal-protection policy. Whether or not those cases are sound as a matter of doctrine, the issue of fetal-protection policies is sufficiently complex that it deserves more extended discussion than the summary treatment it receives in this bill.

E. The Current Bill Discourages Pretrial Settlement and Encourages Protracted Litigation

Numerous features of the current bill would discourage pretrial settlement and encourage protracted litigation. First, as discussed previously, the *Price Waterhouse* modification would take away incentives to settle because the recovery would not be tied to any economic harm. Second, providing for recovery of compensatory and punitive damages makes prediction of recovery impossible. Unlike back pay, which is a reasonably predictable sum, compensatory and punitive damages are unpredictable both in amount and in whether they are awarded. As a result, the opposing parties will tend to value the case differently, with the plaintiff hoping to "hit the big one" by way of a multimillion dollar judgment and the defendant hoping to get off scot free. It is much more difficult to settle a case where the parties have grossly different estimate of its value. Third, amendments to the provisions regarding attorneys fees will overrule *Marek* v. *Chesny*,[41] and make Rule 68 offers considerably less effective. Similarly, the bill overrule *Evan* v. *Jeff D.*,[42] which held that district court have discretion to uphold settlements of class action that include a waiver of attorneys fees. All of these changes will adverely affect the prospect of settlement.

Contrary to the original policy of Title VII, which emphasized prompt resolution of claims of discrimination, the current bill goes far toward slowing down the process—except to the extent that it promptly cuts off the claims of reverse-discrimination plaintiffs. The increase to two years of the period for filing a charge and the adoption of the continuing-violation theory will ensure that courts are entertaining lawsuits challenging much older incidents of alleged discrimination. The features of the bill described above will also ensure that once filed, more of the cases go to trial, rather than being settled or disposed of on motion. How, for example, would a defendant ever be able to obtain summary judgment whenever there is anything that the trier of fact might determine to be a "motivating factor," however trivial.

Moreover, once the cases go to jury trial, they will take longer to try, because availability of compensatory damages will result in the use of expert witnesses to testify to the "emotional trauma," and the availability of punitive damages will make evidence concerning the financial condition of the defendant relevant. The bill creates additional mischief by allowing already-final judgments to be overturned.

F. *Conclusion*

One of the most disturbing aspects of this bill is the underlying assumption that virtually every case that has ever been decided in favor of defendants is wrong and should be overturned and that every case that has ever been decided in favor of plaintiffs should remain the law, except for *Price Waterhouse*, which should be broadened. The roster of cases that this bill would overrule rule reads like a "Who's Who" of cases decided under Title VII and related statutes:

—*Price Waterhouse* v. *Hopkins*
—*Wards Cove Packing* v. *Atonio*
—*Martin* v. *Wilks*
—*Lorance* v. *AT&T Technologies*
—*United Air Lines* v. *Evans*
—*Delaware State College* v. *Ricks*
—*Marek* v. *Chesney*
—*Evans* v. *Jeff D.*
—*Jett* v. *Dallas Independent School District*
—*Brown* v. *General Service Administration*
—*Independent Federation of Flight Attendants* v. *Zipes*
—*Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*
—*Library of Congress* v. *Shaw*
—*Patterson* v. *McLean Credit Union*

To date, the process of development of the law of Title VII has been quite orderly. Plaintiffs do not win all of their cases, but that is not the purpose of the statute, nor

[40] 886 F.2d 871 (7th Cir. 1989).
[41] 473 U.S. 1 (1985).
[42] 475 U.S. 717 (1986).

should it be. The rules have developed in an incremental fashion within the crucible of discrete factual controversies. Despite the preambulary findings in the bill concerning the ineffectiveness of Title VII remedies, history tells a much different tale. Rarely in American history can one find an example of a congressional attempt to deal with a major systemic problem that has been as successful in achieving its purpose. It is perplexing to see the advocates of civil rights now declare defeat in the face of victory.

The CHAIRMAN. I assume, Professor, that you are speaking on behalf of yourself and no one else?

Mr. BROWNE. That's correct.

Senator METZENBAUM. Ms. Shattuck, a partner in the law firm of Epstein, Becker and Green, Washington, DC. She is a former commissioner of the EEOC, speaking, I gather, also on behalf of yourself?

Ms. SHATTUCK. That's correct.

Senator METZENBAUM. Thank you.

Ms. SHATTUCK. I appreciate the invitation of the committee to appear here today.

I do want to focus my testimony. I think instead of talking about the cases and what *Griggs* said or didn't say, or *Wards Cove* said or didn't say, I would like to try to talk about what happens in my daily life, which is now working with employers. It has always been working with employers, whether from one side of the table or the other.

One of the biggest problems that I have as a practitioner is trying to explain to employers what they need to do to comply with the law. I was very interested to hear from Mr. Katzenbach this morning, you know, the general is right, IBM has a terrific company and they've got a terrific employment process. All of my clients are not as sophisticated, if you will, as IBM. Many of them are fortunate if they have an employment office. They don't even have a personnel system. Most of them don't use tests. What they do instead of doing tests is they have an application form. The person fills it out. They are called in. There is an interview, and a decision is made as to whether or not that person should be hired or not hired.

Sometimes there are job descriptions, sometimes there aren't even those because the supervisor or person interviewing the person for the job gets the experience and then finds out whether or not this person can in fact understand the job based on their experience or their conversation from the interview.

So this is a very, very informal process. The same thing that happens, I would guess, in a law firm when people come in to interview. We get a resume. We look at their legal background. These days we have to check to make sure they have a degree and a license. [Laughter.]

But beyond that, we don't give a test to see if you're a good lawyer.

So that is what I deal with on a day-to-day basis. So if the committee would consider what has to be done by employers, I would really think you could serve the general population well.

For example, an employer comes in and says, "I have an affirmative action plan that we have voluntarily adopted because we think that it's the right thing to do. We want to make sure that we are reaching out and that we are making sure that individuals have an

opportunity to perform and to have jobs at every level of our company. We made that as a decision.

"I just got a lawsuit, and this lawsuit says that my practices have a disparate impact on a minority group, and it says that we don't have the same proportion of minorities in our company as exists in the workforce. How could I defend that?"

I say, "Well, you've got your affirmative action plan. Have you been making good-faith efforts?"

"Yes, I have been recruiting. I have been going out to schools in minority areas. I have been working with various transportation managers, and we have set up a special way so that people who may live only in minority areas can get to us. We have expanded our office hours so that people could come and apply. These are the good-faith efforts. And we have had some success, and the employer is proud of that success. They have done the right thing."

I say, "Well, has it been a total success?"

"No, it has not. We have met the requirements of affirmative action. We have done everything we can think of to do, but we don't have 100 percent proportional representation in the jobs in this company."

And you say, "Well, I am sorry, but under the law that was just passed by Congress, if you don't have 100 percent proportional representation, then here is what you are going to have to do to try to formulate a defense: You are going to have to go through and figure out every single thing that goes into making an employment decision, and we've got to sit down and we've got to write them all down. You don't have a test, so I can't tell you if you're doing it on pass-fail scores. We are going to have to sit down and interview everybody who is involved in the employment process and determine whether or not those answers or determine what goes into making the decisions.

"The second thing we're going to have to do after that is we are going to have to look and see if any of these things are related to how well a person can perform a job."

"Fine. That makes sense."

"But the third thing you've got to remember is if there is anything in there that doesn't go to essential job performance, as is suggested by this bill, you still don't have any defense."

"For example, if the complaint were you aren't paying all men and all women the same, that has nothing to do with job performance, even if you base your salary ranges and salary rates on the marketplace. If you require that individuals are trained in safety or have special safety licenses, that doesn't make any difference because if that person can drive a truck, then you shouldn't have to care."

That is the kind of problem that we are going to have to deal with as practitioners, and I would ask that the committee very carefully think about trying to pass a law, if you are going to do that, to meet the needs of the employers so that we can comply with the law, because that is truly what employers want to do.

There is a commitment to affirmative action and to civil rights in the business community, and I for one would like to see us be able to accomplish it without having to set up false standards for employment.

Thank you.

Senator METZENBAUM. Thank you, Ms. Shattuck.

[The prepared statement of Ms. Shattuck follows:]

PREPARED STATEMENT OF CATHIE A. SHATTUCK

Mr. Chairman and Members of the Committee:

I am Cathie A. Shattuck, a partner in the national law firm of Epstein Becker & Green, P.C. and former Commissioner and Vice Chairman of the Equal Employment Opportunity Commission. I thank you for your invitation to appear before this Committee to discuss S. 2104, the Civil Rights Act of 1990.

The views I express today are based on my nearly 19 years as an attorney practicing in the employment law arena. During that time I have been privileged to represent the Colorado Civil Rights Commission, the Equal Employment Opportunity Commission (both as a trial attorney for four years and as a Commissioner and Vice Chairman for two years), individuals seeking their rights as complainants and plaintiffs, and employers seeking to comply with various employment related laws including Title VII. I have tried employment cases, negotiated settlements, advised employers and employees, written and spoken about employment and civil rights matters. I am the co-chairman of the Immigration Law Committee of the American Bar Association's Section of Labor and Employment Law and co-chair of the Legislative Liaison Committee of the Equal Employment Opportunity Committee of the Labor and Employment Section. I also am a contributor to the *Five Year Cumulative Supplement to Employment Discrimination Law*, published by the American Bar Association and the Bureau of National Affairs and I just completed work on my contribution to the chapter concerning reprisal and retaliation for the supplement which will be published in 1990. I have also participated in the liaison activities of the ABA Labor Section's EEO Committee with senior officials of the Equal Employment Opportunity Commission and the United States Department of Labor. These liaison activities have included extensive consideration of the Supreme Court Decisions of the last term which are the subject of S. 2104. I am also a member of the Board of Editors of the *Practical Litigator* published by the American Law Institute and supervising editor of the *Equal Employer*. The views I express in this testimony are my own and not necessarily those of Epstein Becker & Green or any other organization or entity.

SUMMARY

My testimony concerns Section 3 and Section 4 contained in the Civil Rights Act of 1990 (S. 2104). These sections have been described as the *Wards Cove* or *Griggs* restoration provisions.[1] In discussing the two sections I will attempt to give the Committee an idea of the problems which will have to be resolved by employers and by the courts when they seek to either comply with or to enforce the proposed legislation. In order to focus this discussion, I think it would be helpful to briefly discuss how equal opportunity is now a part of the regular business practices of most employers.

When the Civil Rights Act of 1964 [2] *was enacted, the public policy of equal employment opportunity was quickly embraced by businesses and employers as a right and proper expression of the equality and fundamental fairness which all citizens enjoy. A recent example of this acceptance is the employer response to the attempt to revoke Executive Order 11246 which was an issue a few years ago. I am sure that members of this Committee will remember that the business/employer response to that suggestion was a resounding "NO". Employers did not hesitate to let the administration know that affirmative action is an effective tool for assuring that equal employment opportunity is a reality in the workplace. I participated in both private and public discussions with the advocates of affirmative action repeal and was pleased that the ultimate decision was to leave the Executive Order in place. This is but one small example of the willingness of employers to spend the time and resources necessary to create and administer affirmative action programs to ensure that their employment systems are fair and open to all qualified individuals. The same can be said with respect to the Civil Rights Act of 1964 which prohibits discrimination in employment on the basis race, color, religion, sex and national origin.*

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[1] *Wards Cove Packing Co., Inc.* v. *Antonio*, 109 S. Ct. 1775 (1989) *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971).

[2] 42 U.S.C. 2000e *et seq.*

DISCUSSION

In my testimony today I will focus on what I believe to be the unintended consequences which would result if Section 3 and Section 4 of S. 2104 are adopted by the Congress. For purposes of discussion I have identified seven factors which should be considered by the Committee.

First, S. 2104, goes much further than a codification of the *Griggs* standard or any other standards adopted by the Supreme Court in both defining the plaintiff's burden of proof and the defense of business necessity. In order to appreciate the extent to which S. 2104 exceeds the *Griggs* and other pre-*Wards Cove* definitions of business necessity one only has to read the pre-*Wards Cove* decisions of the Supreme Court. From the very beginning of Title VII litigation the court accepted a variety of definitions of "business necessity" depending on what practice or practices were alleged to prove a *prima facie* case of discrimination and what defenses were raised by the employer to defend them. Examples of some of the accepted defenses to challenged practices are:

1. Challenged practice: High school diplomas and tests which screened out protected persons.

Permissible defense: The practice is *related* to job performance.[3]

2. Challenged practice: Prohibition against hiring persons who use methadone which screened out protected persons applying for transit authority jobs.

Permissible defense: Legitimate employment goals of safety and efficiency.[4]

3. Challenged practice: Use of a test which screened out protected persons.

Permissible defense: Correlation between test performance and performance (success) in a training program.[5]

4. Challenged practice: Height and weight requirements for correctional guards which screened out protected persons.

Permissible defense: Validate test to show that the test measures the person for the job and is reasonably necessary to the normal operation of that particular business or enterprise.[6]

5. Challenged practice: Comparable worth challenge to an employer's compensation system.

Permissible defense: Reliance on the marketplace in setting salaries.[7]

Section 4, which purports to establish the burden of proof in disparate impact cases, in reality creates a new definition of unlawful employment practices by allowing a complaining party to demonstrate, on a global basis, that a combination of employment practices or an overall employment-process results in disparate impact. This is the only proof necessary to establish a *prima facie* case under the bill. The term "disparate impact" as it is used in Title VII cases is merely the evidence of an imbalance in the workforce compared to the total number or percentage of persons of a particular race, color, religion, sex and nation origin in any community, State, section or other area in the general population or in an available workforce in any community, State, section, or other area.

Although S. 2104 does not contain a definition as to what "disparate impact" is, presumably it is intended that the definitions previously used by the Supreme Court would act to limit the term by applying standards of statistical significance of one of two deviations or the "80 percent Rule". Without a definition of disparate impact, S. 2104 would allow a complaining party to arguing that *any* statistical imbalance constitutes disparate impact and the legislation does not provide that the complaining party must prove that disparate impact exists with respect to a particular job or job level within the employers workforce. The complaining party may even base his or her proof disparity on gross employment figures. In many ways this reminds me of the early days of Title VII litigation when plaintiff's would file a suit against a company generally alleging that it had discriminated on the basis of race, religion or creed or color or sex by engaging in a pattern or practice of discrimination; *except*, that in the scheme provided in Section 4 a plaintiff would not have to allege where that pattern or practice took place, or what the disparate impact was with respect to specific employment decisions. After stating the racial, sexual or religious composition of the employer's workforce the complaining party would not have to engage in any further discovery nor would he or she have to present evidence as to any

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[3] 404 U.S. 422 (1971).
[4] *New York Transit Authority* v. *Beazer*, 440 U.S. 560 (1979).
[5] *Washington* v. *Davis*, 426 U.S. 229 (1976).
[6] *Dothard* v. *Rawlinson*, 433, U.S. 321
[7] *Spaulding* v. *University of Washington*, 740 F. 2d 686, cert. denied, 469 U.S. 1036 (1984).

specific identifiable individual or group of persons who have been harmed by the disparity.

In order to present a defense the employer would have to identify every single factor that goes into making of every employment decision at every step in the employment process. After those elements have been identified, the employer would have to determine which element or elements caused the non-selection of an individual or group of persons who are protected. In addition, the employer would be required to determine whether there are any other factors in the *entire* employment process which may have operated in such a way as to prevent the consideration of a member or members of a protected group.

Finally, the employer must determine which of the elements it identified are essential to effective job performance (business necessity) as defined by Section 3 of the Civil Rights Act of 1990. Any element which is not essential in the performance of a job would then be unavailable as a defense to the employer. The following examples assist in understanding exactly how this new and limited definition of business necessity would be applied.

1. An employer's sales force is 40 percent of the total available Afro-American sales persons in the Standard Metropolitan Statistical Area (SMSA) in which it does business. In addition, the employer's sales force is comprised of only 10 percent of the Afro-Americans as reported for total in the workforce population. Even if the employer can show that it has used every means available to Afro-American sales persons, i.e., specific advertisements in minority newspapers, on minority television and radio stations, at minority owned job placement centers, with the State of local job service center, with employment agencies located in minority neighborhoods, and recruitment at minority institutions of higher learning and training and trade schools even if 100 percent of all minority applicants were hired, the employer would have no defense to an allegation of disparate impact. All the efforts of the employer would not meet the definition of "business necessity contained in S. 2104."

2. An employer uses a paper and pencil test to evaluate candidates for a position. Before the test was adopted by the employer its hiring rate of Hispanics was 10 percent of the available applicant pool. After the test was instituted, the hiring rates for Hispanic increased to 25 percent and productivity increased by 50 percent. The population statistics for Hispanics in the geographical in which the employer does business is 20 percent in the relevant labor force for the position being tested and 35 percent in the overall population. Using the business definition contained in S. 2104, the employer would logically argue that the test is related to effective job performance. The proof of the effective performance would be the increased productivity which occurred after the test was adopted. Unfortunately, the good effects flowing from the test would have no relevance for an employer seeking to defend itself from a charge of disparate impact under the proof requirements of S. 2104 because the increase in productivity is not necessarily essential to effective job performance; all it means is that the job performance is more efficient. This means that a test which may be valid under the provision of the Uniform Guidelines On Employee Selection Procedures would be of no consequence if there were still a disparity between the available workforce and the number of protected persons (Hispanics) hired by an employer. This is true even if the employer could show that the number of Hispanics hired was *increased* by using the test.

3. An employer evaluates its employees for promotion purposes using the following criteria. (1) job performance in the position the candidate now holds, (2) attendance, (3) leadership, (4) the ability to work with persons with different work styles and personalities, and (5) the ability to analyze a job or task and to make suggestions as to how that job may be more proficiently performed. As defined by Section 3 and 4 of S. 2104, only factor number 1 the performance in the current position would be acceptable as a business necessity justification for selection of an individual for a promotion. This would be especially true in the case where factors 2 thru 5 would be necessary for future advancement but not for an interim job where a employee would be expected to learn new skills to perfect his or her current skills.

The most compelling reason of the theory of disparate impact—to prevent, pretextual discrimination—is better served by placing a moderate burden upon defendants rather than a heavy burden that would, in effect, prevent hidden discrimination only by requiring reverse discrimination. heavy burden serves the more controversial purpose of promoting equal opportunity directly by discouraging employment practices with adverse impact, but only at the risk of contradicting the prohibition against required preferences in Section 703(j). The goal of racial and sexual balance need not be entirely disallowed, but it must be qualified. . . . The theory of disparate impact represents an uneasy compromise between abstract and ambiguous idea of economic equality and the means that Congress thought sufficient to achieve it.

The theory resists neat formulation because it embodies sometimes contradictory purposes, particularly on the issue of business justification. This tension between the different purposes of the theory of disparate impact can be alleviated, if not eliminated entirely by subordinating the goal of racial and sexual balance to the dominate purpose of preventing pretextual discrimination.[8]

Second, all the persons hired to do the same job bring to that job their individual strengths and weaknesses. Such diversity is very desirable in jobs that are not made up of rote tasks. The dynamic of individuality creates a workplace which encourages innovation, increased productivity, loyalty to fellow workers, a competitive edge, team building and enthusiasm for the task to be done or the service to be delivered. Just because such traits may not be essential to an individual's performance of a job, employers should not be prohibited from taking into account such factors when they analyze their employment needs.

Third, the terms "disparate impact" and "discrimination" are not synonymous and Congress should ensure that any legislation it passes does not result in these terms becoming interchangeable bases for anti-discrimination allegations or relief. Care should be taken to ensure that discrimination is challenged, not on the basis of the proportionate representation of protected persons, but by the employer's actions to provide equal employment opportunity. Additionally, employers must be allowed to consider the qualifications of the workforce population and courts must be able to take into account information about that workforce which may work against an employer's efforts to hire or promote minorities or women, i.e., that the pool of qualified applicants for some jobs may be quite small because of labor market shortages caused by an aging workforce and astronomical illiteracy rates in certain younger (both majority and minority) persons which would require remedial education in reading, writing, math and speech before they could perform even the most routine of business tasks.

Fourth, any legislation that attempts to define "business necessity" should do so in such a way that the courts can apply that definition to a variety of business circumstances. For example, an employer should be allowed to defend its actions by showing that it cannot operate its business safely—a valid drivers license and a good driving record for delivery truck drivers, efficiently filing by a person who knows the alphabet vs. one who does not, or in a fiscally responsible manner—the ability to insure drivers or secure a bond for persons who handle money. There should be a way for a court to recognize such facts of business life, even if they do limit the employment of members of a protected group. There should be some allowance for reasonable common sense in determining business necessity.

Fifth, the battle to preserve voluntary affirmative action and Executive Order 11246 should not be abandoned by legislation which focuses only on the result and not on the progress or good faith efforts expended to correct deficiencies in minority or female representation in a workforce. The efforts of business, management lawyers, public interest groups and their lawyers, and government officials who came together to preserve affirmative action because they knew that affirmative action promotes equal employment opportunity should not have been a useless exercise. I, personally, would hate to see a legal system created which would make acceptable the use of quotas as the only means of preventing liability for having a workforce that does not mirror the population and creates, by default, a requirement for preferential treatment contrary to both Section 703(j) of Title VII, and the Executive Order.

Sixth, the application of the disparate impact/business necessity definitions to employment decisions concerning compensation would go far beyond the standards set forth in the Equal Pay Act and Title VII which rest on the principle of equal pay for equal work. In fact, such an application would even go beyond the concept of comparable worth since the identification or definition of the factors to determine comparability are subjective in their initial selection as is the weight given to each factor and there is no assurance that all factors will be "essential to effective job performance". Since S. 2104 provides that disparate impact may be proved by alleging that an entire employment process results in a lower rate of pay for members of a protected group (discrimination) an employer is left with no defense if it bases its rates of pay on the marketplace or other economic grounds.

Seventh, the creation of a system of nearly absolute liability, absent a showing that an employment decision is essential to job performance would creates a system of justice which is contrary to American judicial principles. Currently, our system of

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[8] See: Rutherglen, *Disparate Impact Under Title VII: An Objective Theory Of Discrimination*, 73 Virginia Law Review 1297, 1315–1316 (1987).

justice is based on the concept of notice pleading whereby those who challenge an employment practice must, with some specificity, set forth the grounds for allegations that the law has been violated. The Federal Rules of Civil Procedure allow broad discovery so that plaintiffs may discover facts which prove or may lead to the proof of each allegation. In addition, plaintiffs may use requests for admission to force the defendant to admit what factors it uses in making employment decisions and what factors it will rely on in articulating its reasons for its conduct.

By placing the burden of proof as to what has caused the disparate impact on the employer, S. 2104 would allow defendants to limit the evidence presented and control what relief a court can order. This would not necessarily result in the eradication of discrimination. For example, if an employer can show that a high school education requirement resulted in the non-selection of minorities to a degree that would explain the disparity it need not present any evidence to the court about other selection criteria, even if the same number of minorities would be discriminated against by other criteria.

CONCLUSION

I will leave to others, who have or will appear before this Committee, the discussion of the remaining provisions of S. 2104 and I hope that at some point the original purposes for the adoption of Title VII in 1964 will be recalled and that this bill will be revised so that the statutory scheme intended to encourage equal employment opportunity will in fact do so. In addition, I would suggest that legal scholars be consulted as to the provisions contained in Section 15(a) and (b) as to whether Congress may take away rights which have been vested by judgments made by courts. There may be some very real due process problems which would result from these provisions.

EPSTEIN BECKER & GREEN, P.C.,
Washington, DC, March 27, 1990.

The Honorable EDWARD M. KENNEDY,
Chairman,
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510-6300

DEAR SENATOR: The following is my written response to your letter of March 15, 1990 which I received via FAX on March 26, 1990 concerning S. 2104, the Civil Rights Act of 1990.

Question 1: Suppose that 20 percent of the plumbers in a labor market are members of a particular racial or ethnic group. Suppose further that only 10 percent of the plumbers in a plumbing company in that labor market are member of that same group. How would Sections three and four of S. 2104 apply to this hypothetical?

Response: Applying section 3 and 4 of S. 2104 to the hypothetical would mean that the minority plumbers not hired could present a prima facie case of discrimination simply by presenting evidence of the statistical imbalance. That is, the plaintiff group would not have to prove that the plumbing company did anything that caused their exclusion or the statistical imbalance. Under the bill as drafted, the plaintiffs merely would be required to point to the statistical imbalance and the burden of proof would shift to the plumbing company. If the company were unable to identify business practices causing the imbalance, it would not be able to attempt to demonstrate that those practices were essential to job performance as would be required under S. 2104 and the plaintiffs likely would prevail based solely on evidence of the statistical imbalance. Proof that each individual hire decision was made on a nondiscriminatory basis or that it acted in good faith and made extensive efforts at recruiting from among various protected groups would be irrelevant.

If the plumbing company were able to identify a practice or group of practices that may be responsible for the imbalance, the company then would be required to demonstrate that the practice or group of practices were "essential" to job performance. S. 2104 would deny to the company the "traditional" defense of business necessity first established in *Griggs*.

Question 2: If S. 2104 becomes law, do you believe any competent plaintiff's lawyer will ever allege, in a Title VII disparate impact case, that a specific employment practice causes disparate impact?

Response: No, because by doing so the plaintiff's lawyer would have to prove that the specific practice caused the disparate impact instead of leaving that burden to the employer. A competent plaintiff's lawyer would make the defendant prove which of its practices caused the disparate impact and meet the burden of proof and persuasion that these practices are justified as essential to effective job performance.

Question 3: In your view, under S. 2104, what would happen to the requirement that a plaintiff must show causation between the practices he or she complains about and the disparate impact?

Response: The plaintiff would no longer have to show a nexus between the practice complained of and the disparate impact alleged. Moreover, the plaintiff would not even be required to identify specific practices and the alleged imbalance.

Question 4: Please set forth the disparate impact cases decided by the Supreme Court and whether they have all involved specific identified practices.

Response: Watson v. *Fort Worth Bank & Trust*, 108 S. Ct. 2777 (1988); *Johnson* v. *Transportation Agency*, 480 U.S. 616 (1987); *New York City Transit Authority* v. *Beazer*, 440 U.S. 568 (1979); *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978); *Washington* v. *Davis*, 426 U.S. 229 (1976); *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975); and *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), are the disparate impact cases decided by the Supreme Court that have involved specific identified practices.

Question 5: Isn't a claim that an employer's entire set of employment practices are illegal one that should be heard as an intent case?

Response: Yes. It certainly would be fairer to an employer to be given the opportunity of proving that its decision in a particular individual case was based on nondiscriminatory factors, such as the relative qualifications of the individuals competing for a job. The relief available to the plaintiff, if he or she should prevail, also would specific to the individual injured.

Challenge to an employer's entire set of employment practices, if limited to disparate impact analysis, would otherwise be fundamentally *unfair* because they would not present a claim for which relief could be granted except for the imposition of a quota system of hiring and would do nothing to meet the needs of the employer to hire or retain a workforce capable of competing in the U.S. or world marketplace.

Question 6: If the burden of persuasion in a Title VII disparate impact case is shifted to the employer to make out what amounts to an affirmative defense, will that change Title VII in any fundamental way?

Response: The short answer to your inquiry is that S. 2104 clearly will effect fundamental changes to Title VII. Concerning the specific question, under Title VII, as it was understood before the Supreme Court's decisions during its 1988–89 term, the burden of proof/persuasion shifted to the employer in a disparate impact case once the plaintiff identified the practice or practices at issue that caused an imbalance in the workforce and further proved that the practice or practices caused an imbalance to the detriment of protected class members without serving a valid purpose. The employer then was permitted to prove that the practice or practices were "job-related." That is, that the practices significantly served the employer's legitimate business interests. S. 2104 would, of course, fundamentally change Title VII by limiting use of and altering substantially the defenses of business necessity.

Question 7: Are there going to be any practical difficulties in conducting Title VII litigation wherein the plaintiff alleges both claims of disparate treatment and disparate impact, especially if jury trials are added to Title VII intent cases?

Response: There will be some practical difficulties. There is the danger, for example, that a jury may be swayed by evidence of a statistical disparity in an employer's workforce pertaining to the protected class to which the plaintiff belongs. That disparity, however, may have absolutely nothing to do with the employer's decision vis-a-vis the plaintiff. Yet a jury easily could consider the evidence and make its liability and damages determinations based not solely on evidence pertaining to the specific case of disparate treatment. Judges are loathe, as a rule, to reverse jury decisions, given the heightened scrutiny that an appellate court would give to such trial court actions. Under Title VII currently, evidence of gross statistical disparities would either be irrelevant in a disparate treatment case or a judge would assign it such little probative value as to render it without significance.

Question 8: You testified that S. 2104 will lead to increased and prolonged litigation. Please list all of the provisions which cause this effect and explain how they will do so.

Response: (1) Section 3: The new definition of "business necessity" constitutes a significantly heightened standard. It likely would tend to encourage plaintiffs coun-

sel to challenge to an employer's business operation even where the facts may be weak or where the employer had made a good faith effort to employ and advance in employment members of protected classes because as long as counsel could establish a statistical imbalance in the workforce, the employer would be tasked with proving that its practices were essential to the performance of the job.

(2) Section 4: By deleting the plaintiff's duty to identify employer practices that it believes discriminates, S. 2104 eliminates the care that plaintiffs currently are required to take in filing lawsuits. No longer would the Federal Rules of Civil Procedure (FRCP) have any meaning with respect to pleading of claims for which relief may be granted since even the most general claims would meet the requirements of proof under the statute. No claim tied to statistics would be vulnerable as frivolous under FRCP Rule 11.

(3) Section 5: Under this section, even where an employer's actions were justified and not ultimately based on discrimination, a plaintiff would be considered a prevailing party and entitled to damages and attorneys fees. Often, after the discovery process has begun or is completed, it becomes clear to the parties what the respective strengths of each side's cases are. That is, counsel for both generally know how a case is likely to be resolved and whether it makes sense to take a case to trial or settle it. Under Section 5, a plaintiff's attorney would be less inclined to settle a case even where it was clear that an employer did not discriminate—that is, that the employer's actions are supported by evidence of nondiscriminatory treatment—if he or she could argue that an agent for the employer considered matters related to the plaintiff's sex, race, etc. Because proof of consideration of impermissible criteria satisfies the plaintiff's case-in-chief of discrimination, the employer's evidence that it did not actually discriminate would be relevant only in connection with the damages phase of the action.

(4) Section 7: Title VII currently encourages the prompt resolution of discrimination claims. Section 7 would extend the period to two years. By enlarging the time period (and by otherwise easing considerably a plaintiff's pleading and proof burdens), Congress would be encouraging a significant increase in the number of cases filed under Title VII.

(5) Section 8: The addition of punitive and compensatory jury awards would reduce any incentive on the part of a plaintiff to consider administrative settlement of an action since the liability of the employer could be established with proof merely that an employer considered impermissible criteria during a decision making process, regardless of the validity of the ultimate decision. Plaintiffs lawyers would be more willing to take even marginal cases because the possibility that a case may result in compensatory or punitive damage makes the risks more appealing. Employers would be faced with increased litigation expenses and increased difficulty in settling cases. As a result, employment litigation under Title VII could begin to resemble that common to product liability or medical malpractice, resulting in an increase in the cost of doing business.

Moreover, Section 8 would add jury trial to Title VII cases involving intentional discrimination. It is a fact of life that juries are much more apt to treat a claim seeking millions of dollars in damage more seriously than a judge, and are far more likely to make such substantial awards. Juries will also be influenced by the fact that the disparate impact cases will not be subject to defendants' broad proof to justify its overall employment practices, thus providing the jury an inference that a discriminatory employment system should extend to the disparate treatment parts of the plaintiff's case. The tendency of juries to make greater awards than judges based on the same facts further would make more difficult the ability of an employer to settle a case for a sum approximating the actual injury a plaintiff may have suffered.

(6) Section 9: Amending Title VII to permit recovery of attorneys fees from an employer for the plaintiff's expenses incurred in defending a lawsuit against an intervenor would encourage intervention where it might not otherwise occur. If Congress is concerned about overburdening the courts, one place to start would be by making the intervenor responsible or the plaintiff's fees if it loses. This would encourage intervenors to be more cautious in launching challenges to proposed consent decrees or settlements. It seems unfair to saddle the employer with this additional expense, especially where the employer is making an effort to resolve a dispute. Indeed, an employer would be less inclined to settle a lawsuit if it were unable finally to resolve a dispute and turn off the meters of both its and plaintiff's counsel.

(7) Section 15: This section is designed specifically to foster litigation. By attempting to resurrect dead cases (and assuming that this provision survives constitutional challenge), S. 2104 would increase substantially the workload of the federal courts.

Much of that litigation, at least initially, would be centered around the validity of Congress' retroactive application of the Civil Right Act. These cases also could prove difficult to try or settle, depending on how stale they become before a resurrection is attempted.

Question 9: What impact does Section 13 of S. 2104 have on your concern that this bill will lead to quota hiring by employers?

Response: There is nothing in Section 13 that would preclude imposition of quota relief. Moreover, this section, coupled with Section 11, which calls for broad construction of civil rights laws, may support a court's decision in a given case that a strict quota is necessary to give full effect to a remedial order.

Question 10: How have comparable worth claims fared under Title VII? What impact will Sections three and four of S. 2104 have on the ability to assert and win comparable worth claims?

Response: Comparable worth claims under Title VII have failed except where employers have taken it upon themselves to base their compensation systems solely on the basis of certain characteristics common to all *jobs* not taking into account the marketplace or individual qualifications or experience. When the compensation system was only *jooob* determined and employers chose to intentionally disregard salary disparities between men and women doing comparable *jobs*, intentional discrimination has been found. When systems of compensation were based on the marketplace or merit, comparable worth allegations have failed. Merit or the marketplace systems of compensation are not included in the definition or application of possible affirmative defenses under Section 3 and 4 and thus any claim alleging compensation-based disparate impact and supported by gross statistical evidence of disparities between groups, including allegations of comparable worth, would prevail if the employer were unable to prove that the system was "essential to job performance."

Question 11: Some witnesses have suggested that the Supreme Court's use of the terms "prove," "demonstrate" and "show" in describing the employer's burden in disparate impact cases denotes a burden of persuasion on employers. Please comment.

Response: Under Title VII currently it is the responsibility of *both* plaintiff and defendant to *persuade* the trier of fact by the use of evidence (factual or demonstrative) that its position proves (or shows) that it did or did not occur. The Supreme Court over the years has been less than clear on the burdens that an employer actually bears in Title VII cases. Most lower courts have viewed the burden on employers, after a plaintiff proves adverse impact, as one of proof. If the employer proves business necessity, the burden shifts back to the pliantiff. Regardless of the language that is used, it is clear that Title VII requires evidence that an employer's actions either were not discriminatory or that they are justifiable under the business necessity test.

The effect of S. 2104, however, would be to limit the proof required of a plaintiff and to limit the defendant to one affirmative defense ("essential to the effective performance of a job"), which may or may not be relevant to its employment practices. Such a limitation would place the burden of persuasion on employers to *persuade* a trier of fact that non-job performance elements are in fact elements essential to effective job performance.

Sincerely,

CATHIE A. SHATTUCK

Senator METZENBAUM. Mr. Goldstein, special counsel to the firm of Saperstein, Seligman and Mayeda, in Oakland, CA, speaking, I gather, on behalf of yourself or on behalf of any particular group?

Mr. GOLDSTEIN. Mr. Chair, I am speaking on behalf of myself, and I am really privileged to be asked to speak on this critically important piece of legislation.

My argument really follows a very simple logic: Our unfortunate history of discrimination compels effective fair employment laws. The Civil Rights Act of 1964, as interpreted by *Griggs* and as *Griggs* has been applied for the last 18 years, has been an effective fair employment law.

The third part of the argument: *Wards Cove* undermines the effectiveness of title VII as interpreted and applied by *Griggs* and other decisions.

Accordingly, this committee is doing an extraordinarily important task in restoring title VII and the enforcement of the fair employment law to an effective path.

I will not go through the history. The history of discrimination in this country is well known to this committee. I could not begin to articulate it as eloquently as the Honorable William T. Coleman articulated that history of discrimination a week or so ago before this committee.

Let me just say, though, that Congress in the 1860's did understand that history very well. It understood the harsh effects of discrimination during slavery and after the Civil War.

However, the Acts of Congress were undone by the U.S. Supreme Court in the late 19th century. C. Vann Woodward, the leading historian of this period, said that, "By narrow and ingenious interpretation, the U.S. Supreme Court's decisions over a period of years had whittled away a great part of the authority presumably given the Government for protection of civil rights."

The court, last term, also began to whittle away a greater part of the protections afforded to women and minorities against employment discrimination.

Unlike the Congresses at the end of the last century, Congress at the end of the 20th century must act immediately to reverse the course backwards chartered by the U.S. Supreme Court.

The second part of the argument is the effectiveness of *Griggs*. There is a considerable amount of evidence demonstrating the effectiveness of the *Griggs* rule, the impact standard, the importance of the business necessity rule requiring the demonstration that a practice that bars the equal opportunity advancement of minorities and women be necessary to operation of a business.

Let me just point out one fact because, Senator, you asked this question of Mayor Hudnut, and that was with respect to the effect that the *Griggs* rule and related cases have had on the employment of blacks in police departments around the country, and Mayor Hudnut said that it had a very positive effect in Indianapolis.

Let me just give some statistics on the increase of blacks in police departments from 1970 to 1982, which was a period of very effective and rigorous enforcement of the *Griggs* rule. In 1970, 6.4 percent, or 23,000, of the 375,000 police officers in the country were black. Twelve years later, that percentage had increased by about 150 percent. The number of black police officers had increased by double, to 47,000. That is a benefit that helps all of us in this country, that there is a much more integrated police departments in cities and States around the country, as Attorney General Abrams and others have already stated.

Let me turn now to the application of the *Wards Cove* decision and why it fundamentally undercuts the effective enforcement of the Civil Rights Act of 1964. As Professor Browne says, there are three aspects to it: The prima facie case, and standard, and who has the burden.

With respect to the prima facie case, there are two aspects of the *Wards Cove* decision. One aspect is unobjectionable and is unaddressed by this bill. And people get that confused.

The second aspect, what I call the pinpointing requirement, is objectionable.

Senator METZENBAUM, you stated that the labor market analysis was not changed by the *Wards Cove* decision and it is not addressed by this bill. That is absolutely correct. The plaintiff bears the burden of demonstrating that there is adverse impact in the selection practice from the relevant qualified pool of applicants or persons available in the labor market. That is not objectionable. Plaintiffs have that burden. They will meet in the future; they have met it in the past.

What is objectionable is the second part: If you show that there is a disparity in the selection rate by a company's system from the relevant qualified applicant pool to the people who are selected, you still don't show adverse impact, because there are two or three practices, like in *Wards Cove* where there might be nepotistic hiring, there might be subjective decisionmaking, there might be word-of-mouth referral. You know that those three practices have caused harm. You can't know which one of those three practices has directly resulted in that harm.

Let me just finish this one point.

It is like sending people off on a treasure hunt without clues. The company has the evidence; you don't have the evidence because you can't find the evidence and have no way of finding it. You lose. There is no possibility of getting to the point of even requiring the company to show that the practice is justified. That is an unfair rule. It hasn't been applied previously and should be reversed.

Senator METZENBAUM. Thank you very much, Mr. Goldstein.

[The prepared statement of Mr. Goldstein follows:]

PREPARED STATEMENT OF BARRY GOLDSTEIN

Mr. Chair and Members of the Committee:

I truly appreciate the opportunity to testify before this Committee on such an important matter as the Civil Rights Act of 1990 .

I have had the privilege to represent victims of employment discrimination as an attorney with and Director of the Washington Office of the NAACP Legal Defense and Educational Fund, Inc. for eighteen years, and now, for the last year, as an attorney in private practice. During this nineteen-year period, we have witnessed a dramatic change in the employment opportunities of minorities and women. This Bill, the Civil Rights Act of 1990, will ensure that the United States continues to make progress towards the provision of equal employment opportunity. It is critical legislation. I have been asked to address a part of the Bill, Section 4, which seeks to restore the legal standards that were in effect prior to the Supreme Court's decision in *Wards Cove Packing Co.* v. *Atonio*, 109 S.Ct. 2115 (1989).

The Honorable William T. Coleman, Jr., has testified eloquently before this Committee on February 23, 1990, about the history of slavery and discrimination that for far too long characterized the American workplace, and I will not repeat that history. Over 100 years ago, the post-Civil War Congresses knew full well the harsh effects of slavery and the post-Civil War discrimination that erupted in order to keep black Americans disadvantaged. Unfortunately, the period during which Congress and the Federal bureaucracy sought to enforce civil rights was short-lived.

The Supreme Court of the late Nineteenth Century played a key role in this reversal. As one of the most noted historians of the period, C. Vann Woodward, has described: "By narrow and ingenious interpretation [the Supreme Court's] decisions over a period of years had whittled away a great part of the authority presumably

given the government for protection of civil rights." C. Woodward, The Strange Career of Jim Crow (3d ed. 1974) at 139. Tragically, Professor Woodward's description applies to the supreme Court's decisions in 1989 that "whittl[ed] away a great part" of the protections of minorities and women against employment discrimination.

The retreat from support of civil rights after the Civil War is not unique. The push for fair employment in the World War II wartime industry, which was motivated in large part by national survival, relaxed at the end of the war. A. Philip Randolph, the legendary leader of the Sleeping Car Porters Union, organized the March on Washington Movement designed to rally thousands of blacks to demonstrate on July 1, 1941, at the Lincoln Memorial in protest against employment discrimination. President Roosevelt met with Mr. Randolph. After the meeting, Executive Order No. 8802 was issued and Mr. Randolph "postponed" the march. For the first time this Order established a national policy supporting equal employment opportunity "regardless of race, creed, color, or national origin." The Order created the Fair Employment Practices Commission that, despite limited power, took a stand against employment discrimination and aided the movement of black workers into the war industries.

In its Final Report the Commission made recommendations that would be fulfilled only when Congress passed Title VII almost twenty years later: Congress should adopt fair employment practices legislation since the "mere existence of a Federal policy of non-discrimination will not in itself result in fair employment practices . . ." L. Ruchames, Race. Jobs & Politics—the story of FEPC (1953) at 195. The Commission pulled no punches: "The wartime gains of Negro . . . workers [will be] lost through an unchecked revival of discriminatory practices. . . . This denial of equal opportunity, if allowed to become permanent, cannot fail to create civic discord and to be a cause of embarrassment to the United States in its international relations." *Id.* at viii.

The Congress and the country did not act. The tragic consequences of the failure to act, which were predicted by the Commission, occurred. In 1990 Congress and the country can not fail to act to stem the erosion of fair employment gains made during the 25 years of the enforcement of Title VII.[1]

When Congress passed Title VII of the Civil Rights Act of 1964 it reversed the failures in our country's commitment to fair employment opportunity that occurred after the Civil War and World War II. We cannot retreat a third time. Title VII has contributed to the expanding job opportunities for minorities and the removal of discriminatory barriers. "Nearly a quarter of the minority labor force of 1980 were in significantly better occupations than they would have been under the occupational distribution of 1965." Blumrosen, "The Group Interest Concept, Employment Discrimination, Legislative Intent: The Fallacy of Connecticut v. Teal," 20 Harvard Journal on Legislation 99 (1983). In a comprehensive analysis of the effect of Title VII, Professor Jonathan Leonard determined that the implementation of the anti-discrimination law from 1966 to 1977 significantly raised the share of employment opportunities, pay, and job levels of black workers without any "significant effect on productivity." Leonard, "Anti-discrimination or Reverse Discrimination: The Impact of Changing Demographics, Title VII, and Affirmative Action on Productivity," 19 *The Journal of Human Resources* 145 (1984).[2]

In 1971, the Supreme Court decided "the most important court decision in employment discrimination law," [3] *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). This

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[1] Interestingly, the Civil Rights Act of 1964 was not passed until the great March on Washington, which A. Philip Randolph "postponed" in 1941, occurred in 1963. Mr. Randolph was one of the "mastermind[s]" of the 1964 March. C. Whalen and B. Whalen, The Longest Debate (1985) at 24. The country should not need a return to the tumultuous demonstrations of the 1960s in order to pass a much needed fair employment bill.

[2] Professor Richard Freeman has described Leonard's study as the "only significant empirical study" of the effect of fair employment laws on productivity. Freeman, "Affirmative Action: Good, sad or Irrelevant?" New Perspectives (1984: U.S. Comm. on Civil Rights).

In testimony before the U.S. Commission on Civil Rights, Professor Leonard further described the findings of his study: "Relative minority and female productivity increased between 1966 and 1977, a period of coinciding with government anti-discrimination policy to increase employment opportunities for members of these groups. There is no significant evidence here to support the contention that this increase in employment equity has had marked efficiency costs. The relative marginal productivities of minorities and women have increased as they have progressed into the workforce, suggesting that discriminatory employment practices have been reduced." Leonard, Testimony before the U.S. Commission on Civil Rights, (Feb. 1985).

[3] B. Schlei and P. Grossman, *Employment Discrimination Law* (1983) at 6.

Committee is familiar with *Griggs* and I will only review briefly the decision. The Court determined that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." 401 U.S. at 432.

Critically, the Court interpreted Title VII in a practical manner. If a plaintiff demonstrates that a device or system selects applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants, then the election system is illegally discriminatory unless the employer meets the burden of showing that any given requirement is necessary. "The touchstone [for this determination] is business necessity," *Griggs*, 401 U.S. at 431.

This is a uniquely practical approach to removing discriminatory barriers. The focus remains upon the selection system; the case does not depend upon the "intent" or "state of mind" of the employer. Severe barriers to equal employment opportunity may not remain unassailable because the plaintiff is unable to show that the employer acted in "bad faith." Moreover, the justification for the continuation of the barriers falls upon the employer, the party who has access to the requisite evidence and who, as a matter of course, or good business practices, should have a justification for the use of a selection system.

Almost immediately after the Supreme Court issued the *Griggs* opinion, this Committee recognized its importance, well described that importance, and determined that the *Griggs* principles should be extended to federal government employment.[4]

> [The Civil Service Commission] apparently has not fully recognized that the *general rules and procedures that it has promulagated may in themselves constitute systematic barriers to minorities and women.* Civil Service selection and promotion techniques and requirements are replete with artificial requirements that place a premium on "paper" credentials. Similar requirements in the private sectors of business have often proven of questionable value in predicting job performance and have often resulted in perpetuating existing patterns of discrimination (See, *e.g., Griggs* v. *Duke Power* . . .) The inevitable consequence of this kind of a technique in Federal employment, as it has been in the private sector, is that classes of persons who are socio-economically or educationally disadvantaged suffer a heavy burden in trying to meet such artificial qualifications.
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> *It is in these and other areas where discrimination is institutional. rather than merely a matter of bad faith. that corrective measures appear to be urgently required. For example the Committee expects the Civil Service Commission to undertake a thorough re-examination of its entire testing and qualification program to ensure that the standards enunciated in Griggs are fully met.*

S. Rep. No. 92-415, 92nd Cong., 1st Sess. at 14-15 (Emphasis added).

As this Committee perceptively described in 1971, the "full" implementation of the *Griggs* principles is critical to meeting the fundamental goal of equal employment opportunity. Nineteen years later this Committee should stay the course that it has well-charted and support the Civil Rights Act of 1990 in order to overturn the limitations on the *Griggs* principles placed by the Supreme Court in *Wards Cove Packing Co.*

Before turning to the specific proposals for restoring the legal standards that existed prior to

Wards Cove Packing Co., it is useful to turn to several specific examples of job opportunities in the 1970's that were opened to blacks on a fairer basis after the *Griggs* decision. Two types of jobs provide adequate illustration: police officer and craft worker. For both types of jobs, selection devices, such as tests or referral practices, had served to limit opportunities of blacks. In the 1970s after the *Griggs* opinion, the number of blacks working in these job categories increased dramatically.

> In 1972, blacks made up 3.2 percent or 15,872 of the 496,000 electricians in the country, whereas in 1979 blacks represented 5.6 percent or 35,480 of the 640,000 electricians in the country.[5]
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> In general, during the period 1972 through 1979, the number of blacks employed in the craft and kindred census category, increased by 270,000[6]

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[4] As originally enacted, Title VII only applied to private employment. The Equal Employment Opportunity Act of 1972 extended the law to federal, state, and local government employment.

[5] 1980 Statistical Abstract of the United States (1980) at Table 697.

[6] *Id.*

In 1970, 6.4 percent or 23,796 of the 375,494 police officers and detectives in the country were black,[7] whereas in 1982, 9.3 percent or approximately 47,000 of the 505,000 police officers in the country were black.[8]

While several factors contributed to the substantial increases during the 1970s in the number of blacks working in craft, police and similar positions, the effective implementation of Title VII and application of the *Griggs* rules contributed substantially.

What did the Supreme Court do in *Wards Cove* that so undermined the *Griggs*[9] principles that Congress should act promptly to reverse? In short, in my view as a litigator who has sought to enforce fair employment law for almost twenty years, the Supreme Court has made the *Griggs* impact standard is largely ineffective. Private attorneys, who litigate the overwhelming majority of fair employment Cases would find it difficult, if not impossible, to litigate fair employment cases under the *Griggs* impact standard as changed by the Supreme Court in *Wards Cove Packing Co.* Private attorneys, like myself, will continue to take and litigate cases of intentional discrimination.[10] However, the "most important" fair employment decision, one that this Committee recognized as critical to fair employment opportunity in 1971, and that has served to open job opportunities to disadvantaged minorities, is reduced to a minor role in the enforcement of fair employment law by the Supreme Court in *Wards Cove Packing Co.*

Let me discuss three aspects of the *Wards Cove Packing Co.* opinion in terms of the practical effect by which the opinion thwarts the use of the *Griggs* impact standard to remove unnecessary barriers to fair employment: (1) the proof that a practice disproportionately limits the opportunities of minorities or women, the plaintiffs' prima facie case; (2) the burden of proof; and (3) the standard for justifying a selection practice or system that has an adverse impact.

Prima Facie Case

There are two principal aspects to the prima facie or adverse impact analysis in *Wards Cove Packing Co.* The first aspect, the proper measure of the relevant labor pool is not objectionable. This aspect of the *Wards Cove* decision remains unchanged by the proposed legislation. The second aspect, the 80-called "pinpointing" requirement, is objectionable; the Civil Right Act of 1990 properly removes this requirement.

The proposed bill require that the plaintiff "demonstrates[11] that an employment practice results in a disparate impact on the basis of race.. . ." Section 4 (Footnote added). This provision does not change existing law. Principally, plaintiffs rely upon direct evidence to prove adverse impact that comes from an analysis of the selection of applicants. The applicant flow is clearly highly relevant evidence. *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977). If applicant information is available, the proportion of blacks selected compared to the proportion of blacks who applied is a principal step for determining adverse impact. This straightforward approach directly indicates whether the selection process, justifiably or not, has caused a disparate impact.

This direct approach should resolve most issues of proof of adverse impact *if* the employer follows applicable Federal regulations. As the Supreme Court stated, most employees "are required to 'maintain records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race. . . .'" *Wards Cove Packing Co.*, 109 S.Ct. at 2125, quoting the Uniform Guidelines on Employee Selection Procedures, 29 CFR § 1607.4(A)

However, applicant data may be unavailable because the employer has failed to fulfill its obligations or, as in the case of *Wards Cove Packing Co.*, the Company may not be covered by the Guidelines. Also, "[t]he application process itself might not adequately reflect the actual potential applicant pool, since otherwise qualified

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[7] U.S. Bureau of the Census, Census of the Population: 1970. Vol. 1. Characteristics of the Population. Part 1. United States Summary—Section 1 (1973) at Table 223.

[8] 1984 Statistical Abstract of the United States (1984) at Table 696.

[9] I have referred to the *Griggs* principles; however, these principles have regularly been applied in other Supreme Court opinions, *see, e.g., Dothard* v. *Rawlinson*, 433 U.S. 321 (1977); *Connecticut* v. *Teal*, 457 U.S. 440, 446 (1982), and in hundreds of lower court cases, *see generally*, Testimony of the Honorable William T. Coleman, *supra*.

[10] The Supreme Courts decisions in *Patterson* v. *McLean Credit Union*, 109 S.Ct. 2363 (1989) and *Lorance* v. *AT&T Technologies. Inc.*, 109 S.Ct. 2261 (1989), limit the coverage of and appeal for private attorneys to take fair-employment cases based upon intentional discrimination.

[11] "The term 'demonstrates' means meets the burden of production and persuasion." Section 3 of the Civil Rights Act of 1990.

people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory." *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977) [12] (Emphasis added).

If an analysis of the applicant flow is impossible or inappropriate, then the plaintiff may seek to demonstrate adverse impact by reference to the relevant qualified labor pool. The plaintiff must demonstrate that the labor pool reflects qualified and available workers. Thus, in the majority opinion, Justice White correctly stated that it is "nonsensical" to compare the proportion of minorities in the general workforce with the proportion of minorities selected for skilled positions, such as boat captains, electricians, doctors, and engineers." *Wards Cove Packing Co.*, 109 S.Ct. at 2122. Similarly, in the dissenting opinion, Justice Stevens correctly concluded that "[a]n undisputed requirement for employment either as a cannery or noncannery worker is availability for season employment in the far reaches of Alaska." 109 S.Ct. at 2134. Accordingly, any analysis of the relevant labor pool need include a reasonable analysis of workers available for seasonal work.

The requirement for an appropriately relevant labor market analysis is a two-edged sword. Qualification standards may increase or decrease the proportion of minorities in the relevant labor pool. For example, the proportion of black doctors or engineer is smaller than the proportion of black in the labor force; thus, the relevant qualified black labor force for medical or engineering position would be reduced by a qualification requirement. On the other hand, if professional and highly skilled workers are removed in determining the available labor pool for unskilled positions, the relevant qualified black labor force would be increased by properly adjusting for relevant requisite qualifications. Similarly, since proportionally more minorities are available than whites for seasonal work, the proper adjustment of the relevant labor pool, as suggested by Justice Stevens, would increase the relevant qualified minority labor force by adding a qualification requirement.

If a plaintiff does not challenge a requirement, such as a medical, engineering or other undisputedly relevant degree, electrical or boat pilot license, just to name several qualifications that were apparently appropriate in *Wards Cove Packing Co.* then either the applicant flow or the labor pool must be adjusted for these qualification requirements when the adverse impact analysis is made. Thus, the focus properly turns to whether the selection practices, which are in dispute, have caused impact or disproportionately excluded minorities from job opportunities. In *Wards Cove* the practices to which the adverse impact analysis should have applied included nepotistic hiring, word-of-mouth recruiting, and subjective decisionmaking.

These types of practices, which may often serve as unnecessary or even deliberate barriers to the job opportunities of minorities and women, should be subject to challenge under the *Griggs* adverse impact analysis when the plaintiffs prove by a preponderance of the evidence that these practices combine to limit opportunities of minorities or women. *Wards Cove Packing Co.* wrongly insulates these practices. The Court ruled that even if the plaintiffs properly showed by reference to the relevant qualified labor pool that the selection practices had an adverse impact, "this alone will not suffice to make out a prima facie case of disparate impact." 109 S.Ct. at 2125. Thus, even if plaintiffs conclusively demonstrated that 40 percent of the qualified labor pool were minorities and that only 10 percent of the persons selected after the operation of three selection practices, nepotism, word-of-mouth recruiting, and subjective evaluation process, the plaintiffs would still fail to how adverse impact. The plaintiff must identify and prove which one of the three practices caused the impact. *Id.*

This burden remains on the plaintiffs even though the employer has the best access to the relevant evidence, has a duty under appropriate regulations to keep the relevant data, and, most importantly, even though there is no dispute that the employer's selection system serves as a possibly illegal barrier to equal job opportunity. This "pinpointing" requirement is an improper impediment to the enforcement of the fair employment law; it is comparable to sending players off on a treasure hunt without any clues.

Prior to filing a lawsuit, a plaintiff and his or her attorney may have substantial evidence that an overall selection practice has adverse impact. (It is possible to ascertain by observation some sense of the proportion of minorities in the applicant pool and the proportion of minorities selected for the workforce; or alternatively, with the assistance of a labor market economist, it is possible to make a good estimation of the proportion of minorities in the relevant qualified labor force).

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[12] For example, the challenged height and weight requirements in *Dothard* deterred "otherwise qualified" women from applying for job positions.

However, it is not possible to know prior to filing suit whether the employer has maintained adequate records in order to identify which particular selection practice or practices have caused the adverse impact. Thus, even where there is substantial evidence of adverse impact caused by the selection system and even where the system contains practices, such as nepotism, word-of-mouth, and subjective decision-making, that frequently have been used to discriminate illegally, the plaintiff or plaintiff's lawyer may conclude that the result of a lawsuit under the *Wards Cove* pinpointing standard is too uncertain to litigate. They may understandably decide not to embark upon a treasure hunt without clues. The effective implementation of Title VII is harmed by the pinpointing requirement of *Wards Cove*. The Civil Rights Act of 1990 properly removes this requirement.

Burden of Proof.

It can not be seriously disputed that prior to *Wards Cove Packing Co.* the burden of persuasion was placed squarely on the employer to show that its use of a selection practice that disproportionately limited the opportunities of minorities or women was justifiable. See Testimony of William T. Coleman, supra. As the Court simply stated in *Griggs*: "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." 401 U.S. at 432 (Emphasis added). From 1972 through 1988 I litigated employment cases in many parts of the United States; in not a single instance did a defendant or Court suggest that the burden of persuasion did not shift under the *Griggs* rule.

The Supreme Court's ruling that "[t]he burden of persuasion . . . remains with the disparate-impact plaintiff" is a clear signal that courts are to treat fair employment plaintiffs less sympathetically and that close cases should be decided against claimants. Moreover, it is more difficult for three practical reasons for plaintiffs to prove that a practice is not justifiable, than for a defendant to prove a practice justifiable.

First, the defendant has access to the information about the job and selection practice in question. After all, the employer chose the practice in the first place and it should know the reason for its decision. Second, it is easier to prove the affirmative, that a practice is justified by business necessity, than to prove the negative. This is especially true given the lax standard under *Wards Cove Packing Co.* for making this showing. Third, the employer has more experience and resource to show that selection practice is required by business necessity than a plaintiff has to show the negative.

By reversing the long-established *Griggs* burden-shifting rule, the Supreme Court in *Wards Cove Packing Co.* sent a clear message—it will be difficult, if not impossible, to win many legitimate employment discrimination claims. The message will be heard; unless the Congress reverses this result, legitimate claims will not be pursued or, if pursued, many legitimate claims will be lost. *Standard of Proof.*

For eighteen years the courts, employers, litigants, and governmental agencies have followed the classic standards set forth in *Griggs*: an employer must demonstrate that the employment practice shown to have resulted in disparate impact was justified by a business necessity. The *Griggs* Court made clear with strong language—"business necessity"—that fair employment opportunity was important and that barriers to the hire or advancement of minorities and women would be closely scrutinized.

In *Wards Cove Packing Co.* the Supreme Court almost parodies these standards. The Court changes the "touchstone." It is no longer "business necessity;" rather "[t]he touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice." 109 S.Ct. at 2126. What does this mean? The Supreme Court states that the Court requires more than "[a] mere insubstantial justification,"[13] but less than "essential" or "indispensable." *Id.* This is an enormous playing field without much guidance or rules provided.

Why did the Court jettison the eighteen years of interpretation of the *Griggs* standard? As described earlier, the *Griggs* rules have demonstrably worked to increase fair employment opportunity. Moreover, as shown in Professor Leonard's study, there is no evidence that the gains made by minorities harmed productivity. In fact, the Executive Officer of the American Psychological Association, Dr. Goodstein, stated in congressional testimony "that psychologists generally agree that the caliber of employment practices in organizations has improved dramatically since

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[13] It is incredible that the Court even has to say that "a mere insubstantial justification" is inadequate. Could "a mere insubstantial justification" ever be adequate for anything?

publication of the existing Uniform Guidelines [14] in 1978." Goodstein, "On the Subject of Uniform Guidelines on Employment Selection Procedure," Testimony before the Subcommittee on Employment Opportunities of the Education and Labor Committee of the House of Representatives (Oct. 2, 1985) (Emphasis and footnote added).

Even more important, the courts along with the Federal agencies have flushed out the *Griggs* principles over an 18-year period. The predictability and guidance achieved by the administrative agency and court decisions is lost by the dramatic change in the standard made by the Supreme Court in *Wards Cove Packing Co.* The proposed statutory standard, "essential to effective job performance, [15] is intended to restore the legal rules in effect prior to *Wards Cove Packing Co.*

It is critical to restore the case law and predictability which was overturned by *Wards Cove Packing Co.* It is difficult for attorneys to undertake the representation of potential victims of discrimination when there is unpredictability in the law.

For example, it is my view that under the *Wards Cove* rules a case with the same facts as *Griggs* might likely be decided for the defendant. The Duke Power Company had not intended to discriminate; in fact, the Company had engaged in special efforts to assist under-educated employees, black and white. 401 U.S. at 428-29. Moreover, the high school education requirement, which was struck down by the Supreme Court, was used by the Company for the selection of employees into departments with skilled jobs, such as machinist, electrician, welder, power station operator, and lab technician.[16] The Duke Power Company never required a high school diploma for the Labor Department where jobs requiring manual work were located. 401 U.S. at 427. It is certainly arguable that under the *Wards Cove* standard, where the "touchstone" is a "reasoned inquiry rather than "business necessity" and where the plaintiff rather than the defendant has the burden of proof, that a court might determine that a high school diploma was a "legitimate" requirement for these skilled jobs in a power plant. Therefore, if *Wards Cove* principles had applied in 1971, Willie *Griggs* and other black workers would never have had the opportunity to work in jobs commensurate with their actual abilities and skills.

Conclusion

Congress should overturn the *Wards Cove* rule in order to continue this Country's commitment to fair employment opportunity. We should not retreat from that commitment a we did after the Civil War and after World War II.

But there is a further practical national interest compelling the restoration of the *Griggs* rule. "[B]etween now and the year 2000" non-whites "will make up 29 percent of the new entrants into the labor force . . . twice their current share of the workforce." *Workforce 2000 Work and Workers for the 21st Century* (1987) at xx.[17] "Almost two-thirds of the new entrants into the workforce between now and the year 2000 will be women." *Id.* Given the fact that, as a whole, the workforce during this period "will grow more slowly than at any time since the 1930's," there is a compelling need to "integrate [female,] Black, and Hispanic Workers fully into the economy." *Id.* at xiv. Part of this integration must occur through training and education; but another part should be the removal of unnecessary barriers to the employment opportunity of minorities and women. The *Griggs* standards aim towards this goal: *Wards Cove Packing Co.* is a detour. Congress should return the Country to the path well marked by Congress in 1964 and 1972 and by the Supreme Court in *Griggs*.

Honorable EDWARD M. KENNEDY,
Chairman, Senate Committee on Labor and Human Resources,
Washington, DC 20510-6300

Re: *Civil Rights Act of 1990*

DEAR SENATOR KENNEDY: On March 15, 1990, you wrote to me requesting that I answer two questions submitted by Senator Howard M. Metzenbaum. The questions pertained to the testimony that I had the privilege to offer at the March 1, 1990

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[14] The Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607, were promulgated by the Federal agencies, Equal Employment Opportunity Commission, Departments of Justice and Labor, and the Civil Service Commission (now the Office of Personnel Management), charged with enforcing the fair employment laws. The Guidelines were drafted in order to establish specific standards for implementing the *Griggs* adverse impact principle.

[15] This phrase was used by the Supreme Court to describe the *Griggs* standard in *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977).

[16] The jobs affected by the education and testing requirements are described in the district court opinion. *Griggs* v. *Duke Power Co.*, 292 F. Supp. 243, 245 n.1 (M.D. N. C. 1968).

[17] This report was prepared by the Hudson Institute for the Department of Labor.

hearing of the Committee. I have listed the questions below and done my best to provide succinct answers:

Question 1: Consider the following example:

A well-meaning employer voluntarily adopts an affirmative action program for minority workers. That program includes an active recruitment program in the minority community and a selection process based solely on written tests that previously have been held to meet professional employment standards when those tests were challenged at another firm in the same industry. Despite this employment selection process, the number of minority workers at the employer's plant is not identical to the proportion of minority workers in the community.

All other things being equal, how would you advise the employer in the above example as to whether the employment practice described constitute a violation of sections 3 and 4 of the Civil Rights Act of 1990?

Answer: My advice to the employer is to keep up the good work. The employer undoubtedly has complied with the law as it existed prior to the Supreme Court's decision in *Ward Cove Packing Co.* v. *Atonio*, 109 S.Ct. 2115 (1989), and would be in compliance with the restoration of those legal principles after the passage of the Civil Rights Act of 1990. As is generally the case, the employer should continue to monitor its employment practices. Let me briefly describe how I would think Sections 3 and 4 of the Civil Rights Act of 1990 would apply. Initially, if the Company's selection practices were challenged, Section 4 requires that the "complaining party demonstrate[] that" the selection "practice results in a disparate impact on the basis of race. . . ." Section 3 provides that "[t]he term 'demonstrate' means meets the burdens of production and persuasion."

For at least three reasons the complaining would not meet this burden. First, disparate impact is most directly shown by a significant difference between the proportion of minority applicants and the proportion of minority hires. Only if the applicant pool has been distorted by, for example, discriminatory recruitment practices, is it appropriate to look at the proportion of minority workers in the labor force. Since the employer is "well-meaning" and operates an affirmative action program, there is no basis to conclude that the applicant flow is distorted by discrimination. Since there is fair recruitment and there is no disparate impact upon minority applicants, then a complaining party cannot "demonstrate" that the employer has violated the law.[1]

Second, even if it were appropriate to compare the proportion of minority employees with the proportion of minorities available in the workforce, the relegate group is not "the proportion of minority workers in the community." In

Wards Cove Packing Co. the Supreme Court determined that the comparison must be with the proportion of qualified minorities who are available. 109 S.Ct. at 2122. Thus, if, as in *Wards Cove Packing Co.*, the job in issue are like "boat captains, electricians, doctors, and engineers," then obviously the comparison of the proportion of minority employees in these position must be with the proportion of minorities in the available labor force who are qualified for those jobs. For more than a decade the Supreme Court has ruled that labor force comparisons must take into account relevant qualifications, *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977). The Civil Rights Act of 1990 does not change this plain rule. Since there is no factual basis for "demonstrating" a disparate impact between the proportion of minorities in the employer's workforce and the proportion of minorities among the qualified workers in the labor force, a complaining party could not establish a violation of the law.

Third, even if we assume that it were appropriate to use the benchmark of the proportion of minority workers in the community, there still would be no basis for holding that the Company violated the law. A plaintiff may not "demonstrate" disparate impact by merely showing that the proportion of minority workers "is not identical to the proportion of minority workers in the community." In *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), the Supreme Court ruled that there must be a "markedly disproportionate" election rate of black and white. In general, without getting into the technical detail, the courts and federal regulations have required a significant disparity before the complaining party could show disparate impact. The

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[1] As the Supreme Court stated in *Wards Cove Packing Co.* v. *Atonio*, *supra*, employers are required by government regulations to maintain records that "will disclose the impact [of] its tests." 109 S.Ct. at 2125, quoting, Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(A). Accordingly, employers covered by the Guidelines are required to keep records of the impact of selection practices upon applicants. Thus, the employer should readily have the information about the selection of applicants that would serve to defeat any possible claim.

Civil Rights Act of 1990 does not alter this standard. Accordingly, a complaining party could not "demonstrate" a violation of the law.

Question 2: The representative of the Chamber of Commerce, Mr. Paras, stated that it was ironic and illogical to have a tougher burden of proof test for employers that did not intentionally discriminate. Do you agree? If not, how do you justify so-called tougher burdens of proof for employers in disparate impact cases?

Answer: I completely disagree with Mr. Paras. In his argument, Mr. Paras does a disservice to the public debate since his comments are so misleading.

Mr. Paras' argument is simple and wrong. He observes that the burden of proof does not shift after a complaining party establishes a "prima facie" in a "disparate treatment" case, that is, a case in which the complaining party must prove that the employer has acted with an intent to discriminate. Mr. Paras then argues that it is ironic and illogical to have a tougher burden in a disparate impact case such as proposed in the Civil Rights Act of 1990, which would shift the burden of proof to the employer after the complaining party establishes a "prima facie" case. Mr. Paras ignores fundamental differences between the proof of a "prima facie" case and the purpose of the "prima facie" case for disparate impact and disparate treatment cases.

In a disparate treatment case, the prima facie case serves a straightforward purpose: "it eliminates the most common non discriminatory reasons for the plaintiff's rejection." *Teamsters* v. *United States*, 431 U.S. 324, 358, n. 44 (1977).[2] As the Supreme Court has stated, and as is plainly true, "[t]he burden of establishing disparate treatment is not onerous." *Texas Department of Education* v. *Burdine*, 450 U.S. 248 (1981). Moreover, as the Supreme Court further explained, the prima facie case "raises an inference of discrimination only because we presume these acts is otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 577 (1978).

All the plaintiff proves, in effect, is that she applied for a position, that she was qualified and that a male filled the position. No evidence of direct discrimination is required; nor is there any necessity to link any particular practice or act to discrimination. Given this light burden on the complaining party, all that is required of the employer is to produce evidence that the reason for its rejection of the plaintiff was nondiscriminatory. Once the employer sets forth its reason, the plaintiff may prove that the nondiscriminatory reason was not the real reason. By proving pretext, the plaintiff may prevail.

Under the disparate impact proof of discrimination, the establishment of the prima facie case is substantial. The plaintiff must demonstrate adverse impact by showing a substantial disparity between the selection rates of minorities or women for job opportunities and the proportion of qualified minorities and women who are available to fill the jobs. See answer to Question 1. By establishing this "prima facie" case, the complaining party has proved an important matter: the selection system used by the employer demonstrably reduces the employment opportunities of minorities and women.

Given this proof, it is consistent with the purposes of the fair employment laws to create equal opportunity to require the employer to prove that this selection system is required by "business necessity." This is a practical approach to removing discriminatory barriers. The burden for showing the justification for the continuation of the barriers falls upon the employer, the party who has access to the requisite evidence and who, as a matter of course, or good business practice, should have justification for the use of the election system.

The prima facie case requirements for disparate treatment and disparate impact cases serves different purpose, require significantly different degrees of proof, and properly should require different responses from the employer. Both systems of proof should serve to eliminate discriminatory barriers to equal employment opportunity. If the Civil Rights Act of 1990 is enacted, then the disparate impact proof of discrimination will, once again, become an important means for achieving fair employment opportunity.

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[2] Accordingly the Court provided that a plaintiff establishes a prima facie case by showing: "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973).

I hope these answers assist the Committee in its important review of the Civil Rights Act of 1990.

Very truly yours,
Barry Goldstein

Senator METZENBAUM. We have heard from Mr. Paras and Professor Browne that it is illogical to have a higher burden on employers who unintentionally discriminate than on employers who are charged with intentional discrimination.

How would you respond to that, either Mr. Chauvin or Mr. Goldstein?

Mr. GOLDSTEIN. I will take a shot at it. Thank you.

I think it is straightforward. There is one issue in an intentional discrimination case: Did the defendant discriminate? That is the straightforward issue. The plaintiff has the burden to prove the discrimination.

There are two issues in an impact case. The first one is: Is there a particular practice or system that everyone knows, once it's shown, limits the opportunities of minorities or women? Once you show that, our law is very practical—at least it had been until *Wards Cove* came down. It was very practical. The person who put in the system which limits the opportunities of minorities and women has an affirmative defense, just as General Katzenbach said, affirmative defenses run right throughout our law. And that affirmative defense is to show that they have a necessary business purpose to put in this practice which limits the opportunities of minorities and women to jobs.

The defendant should have that burden. After all, they selected the system. They should know the reason they selected it.

Senator METZENBAUM. Thank you very much.

Mr. CHAUVIN. I concur. I think this whole thing is overrated, the shifting of the burden. It happens in litigation every day and affirmative defense and the shifting of burden, there is nothing unusual about this, and that is the proper source for it to come from: From the employer.

Senator METZENBAUM. Mr. Chauvin.

Mr. CHAUVIN. Yes, sir?

Senator METZENBAUM. Taking Ms. Shattuck's scenario, what should an employer have to do in order to meet the requirements of this bill?

Mr. CHAUVIN. I think the requirements of this bill are, to me, very basic and very fundamental. It gives more than a rational outline to an employer that there are means and methods available for the employer to select on job fitness, to select and not to exclude. The horrors that are painted, I think are just not there. It's just not that big a problem.

I advise employers myself, and it is just not difficult to have them to get employees in their business who are capable and able of doing the job. There is no built-in exclusion because they're black, because they're women, because they're any other reason that they would want to be excluded. And to me, it is elementary that it's fairness; it just gives an even playing field.

We are talking about hiring people. And if you remove the impediments that have historically kept women and minorities from

getting decent jobs, that is not hard to define and it's not hard to do. And there is nothing in this bill that makes it any more difficult than it is to hire anyone else.

Senator METZENBAUM. Mr. Browne, is the bill's definition requiring that an employment selection criterion be essential to job performance, consistent with case law prior to *Wards Cove*, in your opinion?

Mr. BROWNE. No, I don't believe it is, even though the language "essential to effective to job performance" is found in the *Dothard* case, it was not the holding of the case; instead the court was using that language to describe what the defendants had argued. And the consistent rule that the court had applied was whether the test was job-related.

There is a big difference between being job-related and being essential to effective job performance. Under *Griggs*, if an employer came forward and said, "But I can show that whatever define it is that is being questioned accurately predicts job performance," then it would be valid.

Under this test, it would not be valid. The proper response, if the only showing is a rational or an effective predictor of job performance, the court should say, "I'm sorry, Mr. Employer, that is not enough. It has to be essential."

Senator METZENBAUM. Mr. Goldstein, I wonder if you would want to address yourself to the same question. At the same time, I would ask you whether the "essential" test is a good idea as a practical matter of public policy regardless of what the case law would tell us?

Mr. GOLDSTEIN. I think it is a good approach and it has been the approach, although articulated in many different forms for 18 years. As Mr. Burns testified to, there are guides that are available to employees, professional standards as to how you establish that practices are essential or necessary to business performance.

In fact, the Federal Government, the four agencies charged with enforcing the fair employment law, established uniform guidelines on employee selection procedures over a four-year period. Those guidelines were in effect in 1978. They have been followed by the court on numerous occasions, followed by many courts. And those guidelines clearly apply under the *Griggs* rule the "essential" rule, the "necessary" rule, however you want to categorize it.

We know what those rules are. There is predictability there over 18 years. And you can get employers coming before this committee from public and private sectors, saying, "We know how to live with it."

If we launch into the next decade under the *Wards Cove* standard, we don't know what the rules are. That is bad public policy.

Let me just make one last point on this. The U.S. Supreme Court, I believe, in *Wards Cove* almost parodies—almost parodies the standard in *Griggs*. In *Griggs*, the U.S. Supreme Court said, "The touchstone is business necessity." There probably is no more quoted passage in fair employment law than the, "Touchstone is business necessity."

Instead what did the court say in *Wards Cove*? The court said in *Wards Cove*, "The touchstone is a reasoned inquiry." What a difference between the "touchstone is business necessity" to "a reasoned

inquiry." And that will make a difference in lots of cases, including, I would think, as, Senator Metzenbaum, you pointed out, the case of the first witness today, the firefighter from Columbus.

Unfortunately, I have proof of that. Recently the Seventh Circuit Court of Appeals reversed a decision in favor of women who wanted to become firefighters in the city of Evanston, not far from Columbus, who had challenged a physical agility test—the case if *Evans* v. *City of Evanston*, 881 F. 2d 382—because under the new standard in *Wards Cove* perhaps the city of Evanston had met the burden of showing some legitimate, some reasoned interest in having a physically able fire force, which was not the standard under *Griggs* prior to *Wards Cove*.

Senator METZENBAUM. I thank each of the witnesses for their testimony. We will keep the record open. I think that the chair as well as some other members of the committee may have some questions. We will keep the record open for a period of 2 weeks in order that such questions may be responded to.

I want to thank each of you. Some of you have come long distances.

I want to say to you, Mr. Goldstein, if you are talking about Evanston, IL, that is not that close to Columbus, but I understand people in San Francisco thinking so. [Laughter.]

Mr. GOLDSTEIN. I knew I was going to get into trouble.

Senator METZENBAUM. They think everything out here is close together. [Laughter.]

Mr. GOLDSTEIN. I knew I was going to get into trouble.

Senator METZENBAUM. But having said that, I want to thank each of you for your participation today.

Were you trying to say something, Mr. Chauvin?

Mr. CHAUVIN. No, sir. I just want to reemphasize the importance of what a great opportunity the Congress has to continue the march toward equality in the marketplace, and the idea that *Wards Cove* some way expands *Griggs* is something we want to put some more proof in. I think *Wards Cove* is to *Griggs* as a match is to a can of gasoline: It blows it away. [Laughter.]

We don't want to see that much progress go out the window.

Senator METZENBAUM. I will conclude this hearing just by saying, on a personal note, it is rather gratifying to hear you, as a man from Louisville, Kentucky, speaking with a little bit of that Kentucky drawl, speaking out so forcefully and effectively on this legislation today. And we are very happy to have you and, I must say, each of you participating in this hearing regardless of what kind of drawl or accent you have. [Laughter.]

Thanks so much.

[Whereupon, at 12:02 p.m., the committee was adjourned.]

CIVIL RIGHTS ACT OF 1990

WEDNESDAY, MARCH 7, 1990

U.S. SENATE,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC.

The committee met, pursuant to notice, at 8:31 a.m., in room SD-430, Dirksen Senate Office Building, Senator Edward M. Kennedy (chairman of the committee) presiding.

Present: Senators Kennedy, Simon, Adams, Hatch, Coats, and Thurmond.

OPENING STATEMENT OF SENATOR KENNEDY

The CHAIRMAN. We'll get started.

I want to at the outset express my appreciation to all of the witnesses for adjusting their programs and schedules. We have a presentation by the President of Italy at 11 a.m. this morning, which was in the middle of the scheduled time for our hearing, so we have had to make some adjustment, and this has brought about some conflict with some of our members here. So we'll do the best we can in terms of permitting them to both question and make what opening observations they wish about the subject of today's hearings. But again, I am grateful to all of our witnesses this morning for their patience and their understanding.

Today the Labor and Human Resources Committee conducts its fourth and final hearing on the Civil Rights Act of 1990. Our focus today is on the bill's procedural provisions.

One major topic is the bill's response to the U.S. Supreme Court's decision in *Martin* v. *Wilks*. In that case, the Court ruled that consent decrees settling job discrimination cases may be reopened in future lawsuits, even by people who sat on their hands while the Court considered the decree.

Since that decision, longstanding decrees have been challenged in new lawsuits in cities across America. The Civil Rights Act proposes fair procedures to ensure that all interested persons can challenge proposed decrees, while limiting endless litigation and ensuring that fairly settled cases stay settled.

The bill ensures that courts follow due process rules and make reasonable efforts to see that interested persons receive notice of a proposed decree and an opportunity to present their objections before the decree is entered. In this way, all affected interests will be considered, and the bill will result in fairer settlements of job discrimination cases.

The provision in no way encourages quotas to settle cases. By requiring notice to interested persons before decrees are adopted, the bill may actually result in the adoption of fewer objectionable decrees in the future.

The committee will also hear testimony today on the harmful effect that recent U.S. Supreme Court decisions have had on the ability of civil rights plaintiffs to obtain the assistance of counsel and expert witnesses in vindicating their rights. Our bill is designed to redress the balance in a manner that is fair to both plaintiffs and defendants and that eliminates the unreasonable obstacles now facing plaintiffs in discrimination cases.

There are many distinguished witnesses today, and I look forward to their testimony.

Our first panel consists of three distinguished witnesses: Mayor Richard Arrington of Birmingham, AL, who is here to describe Birmingham's experience in the *Martin* v. *Wilks* case. We are very pleased that he is here today. He has appeared before the Judiciary Committee on a number of different occasions, and we welcome his presence here this morning.

Our second witness is Raymond Fitzpatrick of the law firm of Mason and Fitzpatrick in Birmingham, AL. Mr. Fitzpatrick has represented white employees in Birmingham who challenged the consent decree entered by the court in 1981.

And our third witness is James Henson, who is a member of the Birmingham Fire and Rescue Service.

We are pleased to have all of you here today, and before the witnesses commence, I will ask my colleague Senator Hatch if he may have an opening statement.

Opening statement of Senator Hatch

Senator Hatch. Thank you, Senator Kennedy.

I appreciate being here with you today and I appreciate you holding these hearings and inviting the various witnesses.

It seems to me one of the most cherished rights we enjoy as Americans is the right to our own day in court when we believe that we have been actually harmed.

S. 2104, in my opinion, is a harsh, ill-liberal effort to effectively strip certain innocent Americans of their opportunity to assert equal protection claims under the Constitution and employment discrimination claims under our Federal statutes in their own lawsuits.

This could well be the first serious effort in recent years to restrict access to the courts for persons who wish to assert fundamental constitutional claims to equal protection of the laws and basic statutory rights to be free of invidious discrimination.

We will hear a great deal of lawyer talk today about due process and what the Constitution does and does not require, and that, of course, is extremely important, but we must also keep in mind the impact of what we do on the lives of people asserting the most fundamental rights in our whole society.

An individual who is not a party to an employment discrimination case and who has not been joined under the Federal Rules of Civil Procedure should not be bound by the result in that case.

This is so, in my opinion, even if that individual had less formal notice of a proposed order or consent decree or even of the underlying lawsuit prior to the proposal of an order or consent decree.

Unless an individual is a party to a case or actually represented in the case, as in a class action, he or she should have the right to make his or her own claims of racial or gender discrimination and denial of equal protection of the laws in an independent lawsuit.

Such an individual should have the right to do so within the appropriate statute of limitations from the time he or she claims to be actually harmed.

Indeed, this bill allows for just such a subsequent lawsuit for some persons but not others. Suppose the EEOC or the Department of Justice files a lawsuit against an employer on behalf of employees or job applicants who are women or members of a particular racial or ethnic minority group. The persons on whose behalf the government is suing are not parties. But assume they have the notice S. 2104 describes. If the employer settles the case by consent decree, or judgment is entered against the employer, S. 2104 preserves current case law, which prevents those women or minority employees to bring a subsequent lawsuit against that very same employer seeking greater relief for themselves—and I think that is fine.

S. 2104, however, effectively slams the courthouse door in the face of innocent employees not parties to the case if they are later harmed by the very same consent decree or judgment. That is wrong. Let those innocent nonparty employees have a chance to bring their subsequent claim, too.

This transparent double standard is an unedifying example of the extent to which modern American liberalization has departed from the principle of equal justice under law. Does section 6, by overturning *Martin* v. *Wilks*, seek greater finality in employment discrimination cases? Yes and no. The greater finality is sought only against innocent third persons, but not with respect to civil rights plaintiffs.

Charles Allan Wright, Arthur Miller, and A.E. Cooper in their noted work, *Federal Practice and Procedure*, wrote: "The initial presumption that nonparties are not bound by a judgment has been stated in many cases. This presumption draws from the due process right to be heard. It is conceivable that someday this basic postulate may be eroded by courts that believe that one full and fair ligation of an issue is sufficient without regard to the identity of the parties. It is much better, however, to resist any such erosion. One deep-rooted historic tradition that everyone should have his own day in court draws from clear experience with the general fallibility of litigation and with the specific distortions of judgments that arise from the very identity of the parties."

I intend to resist any such erosion. There is some irony, Mr. Chairman, in section 6. Other parts of S. 2104 overturn the *Lorance* decision. Thus the bill permits persons like the women in *Lorance* to sue an employer at the time they are harmed in fact by a seniority provision adopted with a discriminatory intent. I agree with that, and the bill I have introduced, S. 2166, reverses that decision. But let's understand something. Let's let every American have his

or her right to a day in court at the time the individual is actually harmed.

Finally, Mr. Chairman, S. 2104 is not merely content, effectively, to slam the courthouse door in the face of innocent third parties in the future. By applying section 6 retroactively, this bill would literally throw current litigants asserting constitutional equal protection claims and discrimination claims right out of court and into the street without opportunity for redress. And I suppose we will do that in the name of civil rights.

This is an important issue, and I don't think we can just, in the interest of civil rights, ignore it. Therefore I am very interested in the testimony that will be given today. We have a number of eminent people. I welcome the Mayor with us; he is a friend, and we have appeared together before, and I think a great deal of him. And we are happy to have the other witnesses here as well, and of course, our friend, Larry Tribe. I always enjoy listening to Larry.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

I think the point which my friend and colleague brings up on the distinction between a consent decree and a seniority plan is an important and significant one. I think we have tried over the course of the hearings and in the presentations to draw that kind of distinction. There is a concern about that distinction, but I think it is a very real one, and we'll have a chance to explore that during the course of the hearings this morning.

Mayor, the good words of welcome we expressed a few moments ago are still echoing in the room. We are glad to hear from you this morning.

STATEMENTS OF HON. RICHARD ARRINGTON, JR., MAYOR OF BIRMINGHAM, AL, ACCOMPANIED BY JAMES P. ALEXANDER, COUNSEL ATTORNEY, BRADLEY, ARRANT, ROSE AND WHITE, BIRMINGHAM, AL; RAYMOND P. FITZPATRICK, JR., ATTORNEY, MASON AND FITZPATRICK, BIRMINGHAM, AL; AND JAMES W. HENSON, BIRMINGHAM FIRE AND RESCUE SERVICE, BIRMINGHAM, AL

Mr. ARRINGTON. Thank you very much, Mr. Chairman, and Senator Hatch.

I am, as noted, Richard Arrington, Jr., Mayor of the City of Birmingham, AL. I am accompanied today by Mr. Jim Alexander, seated to my right, who is an attorney with Bradley Arrant, the firm which represents us in this litigation.

The CHAIRMAN. Mr. Alexander, we want to welcome you, and if you wish to join the Mayor at the table, please do.

Mr. ARRINGTON. I want to thank you for giving me this opportunity. I am here to urge your support for the adoption of section 6, entitled "Facilitating Prompt and Order Resolution to Employment Practices Implementing Litigated or Consent Judgments or Orders."

I have submitted a written statement of my testimony in support of the legislation, and I request in the interest of time that my written statement be made a part of the written record of this committee hearing.

The CHAIRMAN. All the statements will be part of the hearing record as if read.

Mr. ARRINGTON. Thank you.

I request that I be given 3 to 5 minutes, then, to mention in summary form several of the salient points of my written testimony, and then, of course, to respond to questions or whatever procedure the committee follows.

I would like to orally underscore the following relevant points. I describe in my written testimony the catastrophic experience of Birmingham regarding the affirmative action consent decree to which it is a part—that is, the consent degree that led to *Martin* v. *Wilks*.

We have been embroiled in litigation around issues directly related to this consent decree and the *Wilks* decision for the past 16 years. I believe that it is critical to effective functioning of local governance, with finite resources, that what has happened to the City of Birmingham in this case not be repeated elsewhere.

Our experience certainly demonstrates the need for this legislation.

Birmingham's history of *de jurist* segregation and discrimination against blacks is well-known. Because of such discrimination, Birmingham did not hire its first black police officer until 1966; its first black firefighter was hired in 1968; its second black firefighter was hired in 1974. By the time we entered into the 1981 consent decree, only 13 percent of our police officers and only 9 percent of our firefighters were black in a city that was predominantly black.

Since 1981, with the aid of the consent decree, Birmingham has made great strides toward overcoming its long history of racial discrimination and has made substantial progress toward becoming a harmonious biracial city, economically and social vibrant. As a son of Birmingham and as Mayor of the City of Birmingham, I am especially proud of our people and of this dramatic progress that we have made in a very short time period.

But the progress is being impeded, and it is even being threatened by the continued litigation revolving around the consent decree and *Martin* v. *Wilks*.

The city was sued by blacks in 1974 for employment discrimination. The next year, in 1974, the United States Justice Department sued us for the very same reason. By 1981, following 7 years of litigation in which entry-level examinations which were used for police and fire department were found to be discriminatory and were invalidated by a Federal Court judge and in which promotional examinations were not yet found to be valid or predictors of success on jobs. And at the urging of the United States Department of Justice, and on the advice of our attorneys, and with the approval of a predominantly white city council, we negotiated the 1981 consent decree, with the written assurance of the Justice Department that it would defend that decree, which it helped to fashion and played a lead role in, against all attacks.

Prior to the adoption of the decree, the Federal District Court held a well-publicized fairness hearing at which the white firefighters union, which court testimony showed had been aware of the litigation from its inception, filed and argued its objections to the

decree. The court considered those objections, but found the decree equitable, constitutional and consistent with public policy.

In 1982, with the first ever promotion of a black in the Birmingham Fire Department, several reverse discrimination lawsuits were filed against the city. To our dismay, in 1984, the Justice Department intervened against the city in that case and abdicated its responsibility to defend that consent decree it had helped to fashion. But after a trial in 1984, the Federal District Court reaffirmed its conclusion of 1981 that the decrees were valid and lawful.

Now, when the case reached the U.S. Supreme Court, that Court declined to address the city's argument that plaintiff's had already been allowed their day in court to challenge the decree, both we said in 1981 and again in 1985. However, the Court decided that case on a procedural technicality.

Now, coming to a close, I point out that 8 years after we thought the litigation was settled, we face another trial sometime this year on the validity of the consent decree. We will be defending the decree against the same parties who challenged it in 1981 and again in 1985 and who are making the identical arguments which were made by them in 1981 and 1985. Senators, even if we prevail in this litigation, without legislation such as proposed in section 6, we may not end this nightmare of litigation and expense to our city which has cost us more than $1 million in lawyers' fees.

I close out by saying to you that such litigation can only serve to discourage the eradication through voluntary affirmative action of discrimination in the private sector in and around our city. The city's experience is certainly not one employers would wish to undergo no matter how committed they may be to equal employment opportunity. We do not seek a license to engage in unlawful reverse discrimination. We do not seek to gag the objections, legitimate or otherwise, of white employees to affirmative action. We certainly do not seek to deprive anyone of their constitutional right to an opportunity for a day in court.

We are here to seek provisions for harmonizing those rights with the right of blacks to have discrimination redressed and its effects eradicated, and to achieve some finality in litigation, and the right of men and women of all colors to have controversy resolved and laid to rest.

I believe the act under consideration will harmonize those rights.

I thank you very much.

The CHAIRMAN. Thank you very much.

[The prepared statement of Mr. Arrington follows:]

PREPARED STATEMENT OF RICHARD ARRINGTON, JR.

Mr. Chairman, I thank you for the opportunity to appear before this Committee. I am Richard Arrington, Jr., Mayor of the City of Birmingham, Alabama. I am here to describe for you the catastrophic experience of the City of Birmingham with regard to the Department of Justice consent decree to which it is a party--the consent decree that was at issue in *Martin v. Wilks*. I believe that an unadorned narration of the facts will compel your support for the adoption of Section 6, entitled Facilitating Prompt and Orderly Resolution To Employment Practices Implementing Litigated or Consent Judgments or Orders. As will appear from my testimony, it is critical to the efficient functioning of local governments, particularly municipalities operating with finite resources, that what has happened to the City of Birmingham not be repeated elsewhere.

Little need be said about Birmingham's history of discrimination against blacks. Decades of *de jure* segregation led to the eruption in the 1960's of racial strife--strife well-documented in Supreme Court jurisprudence,[1] in the contemporary national media, and, indeed, in the annals of history. Birmingham's legacy of discrimination was reflected by its grossly-skewed employment history and statistics. In January of 1966, blacks held but nine of the 1,689 classified positions in the City of Birmingham. The first black police officer was not hired by the City until 1966. Ten years later only 28, or 5%, of the

[1] *See Walker v. City of Birmingham*, 388 U.S. 307, 325 n.1 (1967) (Warren, C.J., dissenting) *(citing Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965), *Shuttlesworth v. City of Birmingham*, 376 U.S. 339 (1964), *Shuttlesworth v. City of Birmingham*, 373 U.S. 262 (1963), *Gober v. City of Birmingham*, 373 U.S. 374 (1963) and *In re Shuttlesworth*, 369 U.S. 35 (1962)).

City's police officers were black. There were only 2 black sergeants by 1976, and no black had attained a rank above that of sergeant. When the consent decree was entered, the complement of black police officers was 13%, and that statistic reflects the result of four years of court-ordered affirmative action at that entry-level position.

Even worse was the history of the fire department, where resistance was greater because meals and sleeping quarters had to be shared with blacks. The City hired its first black firefighter in 1968, and its second black firefighter in 1974; 170 whites had been hired in the interim. In late 1976, eight (1.8%) of the City's 437 firefighters were black. By the time the consent decree was entered in 1981, a scant 9.3% of the City's firefighters were black (again, after 4 years of court-ordered affirmative action), and no black had ever attained a rank higher than that of entry-level firefighter. Significantly, these woeful statistics were those of a City which in 1981 had a majority black population.

Given such statistics, it was small surprise when, in 1974, separate employment discrimination suits were filed against the City and the Jefferson County Personnel Board ("the Board")[2] by a local branch of the NAACP (represented by private counsel) and a

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[2] The Board is essentially an independent administrator of a county-wide civil service system. Act No. 248 of the regular session of the Legislature of 1945, as amended (the "Enabling Act"), established the "merit system" whereby the Board is authorized under state law to "fairly test the relative capacity and fitness" of applicants for employment or promotion within the county and municipalities within Jefferson County. Pursuant to the Enabling Act and the Board's Rules and Regulations, the Board is responsible for the recruitment, screening, testing and certification of applicants for hiring or promotion. Board members are not appointed by the City, and the City is one of many jurisdictions under the Board's authority. The City is in the unfortunate position of having no control over the selection procedures utilized, or the candidates certified, by the Board.

In instances involving candidates for promotion in the Fire and Engineering Departments, the order in which candidates are certified is based on rank on the Eligible Register, which in turn is based on a candidate's score on a written exam administered by the Board and the award of one seniority point for each year of continuous service in the

group of individual employees on behalf of a class (represented by the Lawyers Committee for Civil Rights Under Law). In 1975, the Justice Department also filed suit, charging a pattern and practice of race and sex discrimination throughout City employment.

Those lawsuits were consolidated for trial before Federal Judge Sam C. Pointer, Jr. The court determined to hear the consolidated cases in stages, and an initial trial, focusing on the Board's entry level examinations for the fire and police departments, was held in 1976. In January, 1977, the trial court found that those tests, with their marked adverse impact, were invalid for rank order purposes. As a remedy, the court ordered the Board to certify applicants based on applicant flow by race. The court's order was affirmed in all material respects on appeal.

A second trial was held in August and October, 1979. That trial addressed challenges to a number of promotional exams,[3] as well as other promotional practices. The promotional practices at issue combined to pose "built-in headwinds" to blacks. In the fire department, for example, a four year time-in-grade requirement was imposed for promotion to lieutenant. In 1979, only three of the 49 black firefighters met this requirement, compared to approximately 77% of the 377 white firefighters. Another prerequisite for promotion was the achievement of a "promotional potential rating" of 85 or above. These ratings were based on the subjective evaluations of the all-white supervisory force.

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merit system up to 20 years. A department head may recommend any candidate certified in its sole discretion. That recommendation is reviewed by the chief personnel officer and the mayor for approval before the promotion is effected.

[3] Certain promotional exams, those in the Fire Department, for example, were not challenged, because gross under-representation at the entry level deprived the parties of statistically significant samples.

Tellingly, blacks received failing scores almost four times more frequently than whites, a pass/fail ratio shown to be statistically significant at the .0001 level. If able to clear those hurdles, blacks remained burdened by skewed scores from tests of doubtful validity, scores diluted further by the addition to all scores of a seniority point for each year of employment in the classified service, up to 20 points. The virtual exclusion of blacks from the classified service into the 1970's ensured that the use of seniority points would artificially advance the promotion prospects of whites over blacks.

After the second trial,[4] but prior to a decision from the court, the parties, led by the Department of Justice, commenced settlement negotiations. Those protracted negotiations culminated in two proposed consent decrees, one among the United States, the private plaintiffs, and the City, and one among the United States, the private plaintiffs, and the Board. The City Decree provided long term and interim goals for hiring and promotion of blacks and females to achieve a City work force representative of the composition of the County labor force. The Board Decree, in pertinent part, required the Board to certify to the City sufficient numbers of blacks and females to enable the City to meet its goals. The Consent Decrees were comparable to a number of like consent decrees proposed and entered by the Justice Department with other municipalities in the same time period. The proposed Consent Decrees were signed by the parties and presented to the court for preliminary approval in May, 1981.

On June 8, 1981, Judge Pointer issued an Order certifying settlement classes and provisionally approving the City and Board Decrees, subject to final approval after

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[4] A third trial, focusing on discriminatory practices of the City (including the use of segregated restrooms) was to be held in the future.

considering any objections at a Fairness Hearing set for August 3, 1981. Pursuant to the terms of the proposed Decrees, notice of the Fairness Hearing--notice directed to all interested persons--was published in the Birmingham News and a local paper of predominately black circulation.

The formal published notice was far from the first actual notice that the present white plaintiffs had of the litigation leading to the Consent Decrees. The instigation of the lawsuits in 1974 and 1975, the first trial in 1976, and the second trial in 1979 had all received substantial local publicity. The President of the Birmingham Firefighters Association, one of the employee unions supporting the reverse discrimination litigation, has testified that he and the BFA were aware of the litigation in 1974, and monitored its progress throughout. For these and other reasons, the Eleventh Circuit found in 1983 that the present white plaintiffs "knew at an early stage in the proceedings that their rights could be adversely affected." Despite their knowledge of the litigation and its potential to affect their interests, the current white plaintiffs had done nothing to protect, or even identify, their "interest" for over seven years.

Shortly before the Fairness Hearing, the BFA and others, represented by the attorney now prosecuting the reverse discrimination litigation, filed objections to the Consent Decrees. They argued those objections at the Fairness Hearing. In so doing, they were provided every opportunity they requested. They had not, prior to the Fairness hearing, sought to intervene, sought leave to participate in discovery, or sought a continuance in order to prepare their opposition. They declined the trial court's express invitation to present evidence at the Hearing. They did, however, express their objections, orally and in writing, and those objections were considered by the court. The objections

presented were the very objections now pressed by the plaintiffs in their many lawsuits--that there was not an adequate predicate of discrimination to warrant affirmative action, and that the affirmative action impermissibly trammeled the interests of white employees.

In evaluating the relief provided by the Consent Decrees, Judge Pointer considered "the terms of the proposed Decrees, the nature of the objections, the status of the judicial proceedings, and the evidence before the court." Based on that evidence, the court concluded that "there is more than ample reason for the Personnel Board and the City of Birmingham to be concerned that they would be in time held liable for discrimination at higher level positions in the police and fire departments and for discrimination against women at all levels of those departments." Upon his review of the evidence of discrimination, and after full consideration of the objections to the terms of the Decrees, Judge Pointer concluded that the settlement embodied in the Decrees "is not inequitable, unconstitutional, or otherwise against public policy."

After the Fairness Hearing, and over seven years after first learning of the litigation and its possible effect on their interests, white firefighters moved to intervene in the consolidated cases. That motion was denied as untimely, a ruling affirmed on appeal. In so affirming, however, the Eleventh Circuit set the stage for what has been eight additional years of litigation, and promises to be many more. The Eleventh Circuit rejected the "impermissible collateral attack" doctrine, disregarding the theretofore unanimous view of the courts of appeal addressing the issue, and did so without the benefit of briefing or argument on the issue from either side.

Commencing in April, 1982, a total of seven different reverse discrimination lawsuits were filed. The first of these was filed to challenge the City's first-ever promotion of a black to the position of fire lieutenant. That case was randomly, and hence, fortuitously, assigned to Judge Pointer, who had entered the Consent Decrees. However, he declined to consolidate that case with the consent decree litigation. The next two of the cases filed were randomly assigned to Judge William Acker, who denied a motion to consolidate those cases with that pending before Judge Pointer. Hence, the City stood a very real chance of incurring conflicting obligations; not only between the original litigation and the reverse discrimination litigation, but between the potentially different rulings of two different judges in the reverse discrimination litigation. Ultimately, Judge Pointer ordered all reverse discrimination litigation consolidated before him. However, that result obtained not because he had entered the Consent Decrees, and had retained jurisdiction to supervise their implementation, but because, again fortuitously, he had been assigned the first-filed of the reverse cases.

When two of the cases were still pending before Judge Acker, he had invited the Justice Department to participate in the litigation, given their status as a party to the Decrees. Despite the fact that Justice had authored the Decrees, had signed them and urged their adoption by the District Court, and had pledged to defend the Decrees and all actions pursuant thereto, Justice intervened on the side of the white plaintiffs challenging the Decrees. The Department's perfidy in that regard is well-documented in other testimony offered by the City of Birmingham in opposition to the nomination of Bradford Reynolds for the position of Associate Attorney General, and I have neither the time nor the inclination to reiterate it here. Suffice it for the present to note that the Justice Department, commencing in 1982, repudiated almost 20 years of strong and effective

support of civil rights, abdicated its responsibility to lead the fight for civil rights, and ignored its congressional and popular mandate.

After substantial preparation, which included over 115 depositions and literally volumes of written discovery, a trial commenced on December 16, 1985, limited to the claims pertaining to the Fire and Engineering Departments. The plaintiffs and the Justice Department focused their case upon efforts to demonstrate the plaintiffs were better qualified than the blacks promoted, and that their interests in promotion had been impermissibly trammeled by the Decrees. The plaintiffs elected to mount no other challenges of any nature to the Decrees--they offered no evidence bearing on the validity of the Decrees that was rejected by the trial court.

The City responded with evidence demonstrating that the criteria used by the plaintiffs to compare qualifications were all tainted by past discrimination against blacks, and that there existed no valid basis in which to conclude that the white plaintiffs were better qualified. The City proved that the affirmative action provisions of the Decrees had not placed an undue burden on white employees. In that regard, the defendants elicited evidence that in the four years after entry of the City Decree, of 32 fire lieutenant promotions in the BFRS, 19 went to whites and 13 to blacks (one of whom was later promoted to captain); that only one of the 11 individuals promoted to captain prior to trial is black; that captain was then the highest rank achieved by a black in the BFRS; and that eight of the 16 plaintiffs alleging that they were discriminatory denied promotions in the BFRS had been promoted by the time of the trial.[5]

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[5] As of the date of the City's Brief to the Supreme Court, there had been 61 promotions to lieutenant since the entry of the Decree, with 34 awarded to whites and 27 to blacks. Twenty-eight captain promotions were made during that time; 21 went to whites

With regard to the Engineering Department, defendants adduced evidence that in the period from entry of the City Decree to December, 1985, there were 49 promotions in the Engineering Department -- 36 whites, 11 blacks and two others; that of the 27 technical employees promoted in the Engineering Department, 21 were white and six were black; that both before and after his challenged promotion to civil engineer, Lucius Thomas was the highest ranking black employee in the City's Engineering Department; and that the sole complaining white employee was offered but rejected a promotion to right-of-way agent.[6]

At the conclusion of the trial, the court entered judgment for the City, reaffirming its 1981 conclusion that the Decrees were valid and lawful, finding that the employment decisions at issue were required by the City Decree, and holding that actions taken pursuant to a valid Decree were lawful. The plaintiffs and the Justice Department appealed.

All parties to the appeal argued the issue of the validity or lawfulness of the Consent Decrees, as all parties recognized that issue had been addressed and determined below. At oral argument, however, the complexion of the appeal was changed by Judge Tjoflat. Seeking support for the result he apparently had already concluded to reach, that

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and 7 to blacks. Only within the past month had a black been promoted to one of the 15 battalion chief positions. Of the 16 BFRS white plaintiffs whose claims were here at issue, 14 had been promoted since the entry of the Decree.

[6] By late August, 1988, over seven years after the entry of the Decrees, blacks held none of the 13 professional positions in the Engineering Department and only 7 of the 41 technical positions.

Judge inquired of plaintiffs' counsel, in a question so leading as to provide a road map: Isn't it true that you were deprived of your day in court to challenge the decree by the court below? Plaintiffs' counsel's response: No sir, that is not the case. Counsel for the United States, when asked the same question, made the same response.[7] Incredibly, that panel of the Eleventh Circuit, in a 2-1 opinion by Judge Tjoflat, held that the plaintiffs had been denied their day in court, once again reaching an issue that had neither been briefed or argued by any party, and a result expressly disclaimed by plaintiffs' counsel.

The defendants filed separate petitions for a writ of certiorari to the Eleventh Circuit. The City's petition sought review as to two issues. First, in effect, was whether the Eleventh Circuit had erred in refusing to follow the impermissible collateral attack doctrine followed in virtually every Circuit having addressed the issue.[8] Second, the City sought review of the Circuit Court majority's holding that the plaintiffs had not been accorded their "day in court." The Supreme Court granted the petition only with respect to the first issue, to the exclusion of the City's argument that plaintiffs had already been allowed their day in court to challenge the validity of the Decrees.

The importance of the issues addressed in Section Six of the proposed Act is well-demonstrated by the host of various organizations and entities which filed or joined briefs *amicus curiae* with the Court in support of the City. The Supreme Court was urged

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[7] By practice of the Eleventh Circuit, a transcript of the oral argument is unavailable to the City. As a result, the question and answer may be paraphrased, rather than quoted. The question was undoubtedly leading and was in substance the question quoted above. The response was clearly in the negative.

[8] The Defendant-Intervenors and the Board had also identified this question as the first issue for review.

to adopt the impermissible collateral attack doctrine by such diverse groups as the Equal Employment Advisory Council, the Pacific Legal Foundation, the National League of Cities, the National Governors' Association, the U.S. Conference of Mayors, the Council of State Governments, the International City Management Association, the National Conference of State Legislatures, the National Association of Counties, the American Civil Liberties Union, the Alabama Civil Liberties Union, the Women's Equity Action League, the NAACP, and by 32 states, the District of Columbia, and the Virgin Islands. Policies of recognized importance and magnitude, policies I will speak of below, were at stake. The issues and implications, both legal and practical, were immense and complex. Yet, the five-member majority decided the case not upon a careful balance of competing national policies, but upon their conclusion that the Federal Rules of Civil Procedures always require that non-parties be joined, and never require that interested non-parties intervene. In other words, the majority decided the case on a procedural technicality (and are not free from doubt), as though it involved only a garden variety lawsuit.

As a result of this dark comedy, the City of Birmingham remains embroiled in employment discrimination litigation over 16 years after the original lawsuits were filed, and over eight years after it thought the litigation had been settled consistent with Justice Department direction. We face yet another trial sometime this year on the validity of a Consent Decree, the validity of which was confirmed in 1981 and again in 1985. In that trial, we will be defending the Decree against the same parties who challenged it in 1981 and 1985, and who are making the identical arguments they made in 1981 and 1985. I am warned by counsel that a third successful defense of the Decree, even if affirmed on appeal, will not likely end this taxpayer financial debacle. First, the 1985 and the upcoming trial concerned only the Fire and Police Departments--the white policemen, street and sanitation

workers, and others remain poised to take their shots. Once all of the current plaintiffs have finished, a host of new white employees, who have not had their own personal "day in court," can be expected to accept the Supreme Court's invitation to sue the City. The executive branch, through the Justice Department, and the Judiciary, through the Supreme Court, have abdicated their responsibilities in defense of civil rights. It falls to Congress to end this farce, which runs counter to every policy embodied in Title VII and the Civil Rights Acts, as well as the long recognized goal of finality in litigation.

Let me turn now to those policies, once considered paramount, that have been devastated by the Supreme Court on the basis of a procedural technicality. Foremost among these are those underlying Title VII. The Supreme Court has frequently recognized Congress' expressed intent of "encouraging voluntary settlement of employment discrimination claims." *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981). "Cooperation and voluntary compliance were selected [by Congress] as the preferred reasons for achieving" equal employment opportunity. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). The Court has also recognized the companion policy against unreasonable delay and unnecessary expense in remedying discrimination and its effects. See generally, *Local 93, International Association of Firefighters v. City of Cleveland*, 478 U.S. 501, 515-516 (1986). The threat presented to these dual policies by *Martin v. Wilks* becomes more dangerous where, as in the City's case, the employer is a public employer.

Eradication of discrimination in the public sector is of special importance, both because discrimination in the public sector impugns a government's intent and ability to represent all citizens, and because elimination of discrimination in the public sector fosters the elimination of discrimination in the private sector. See generally H.R. 92-238,

2 U.S. Cong. & Adm. News 2137, 2152-54, 2157-60 (1972) (legislative history of 1972 amendment which brought public employers within the coverage of Title VII).

Entirely aside from their significant contribution to the effectuation of the policies behind Title VII, consent decrees, as a device, yield benefits warranting the protection provided by Section 6 of the Act. Consent decrees have been employed in a variety of legal contexts and their value in promoting the public interest cannot be gainsaid: 1) Consent decrees foster more expeditious compliance with legislation in the public interest; 2) They remove complex and time-consuming litigation, which someone must finance, from already burdened dockets; 3) They act as a lubricant for correction of violations. A party who has agreed to the relief granted is more likely to implement that relief voluntarily and effectively; 4) Concomitantly, the relief will be more effective, because it has been tailored, through negotiation, to the competing needs of the parties; and 5) Consent decrees channel public resources--both financial and otherwise--away from litigation and toward resolution and remedy of the problem.

Facilitating simple and certain finality of litigation is, of course, a worthy goal in and of itself. Finality is vital to the conservation of judicial resources, prevention of vexatious litigation, minimization of the risk of inconsistent or conflicting obligations, and the preservation of the respect and certitude due judicial pronouncements. See, e.g. *Hoag v. New Jersey*, 356 U.S. 464, 470 (1958); *Allen v. McCurry*, 449 U.S. 90, 94-96 (1980). As the Supreme Court has stated:

> A fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive . . . . To preclude parties from contesting

> matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.
>
> We also fear that the urge to relitigate, once loosed, will not easily be cabined . . . . It would be counter to the interests of all parties . . . to open what may become a Pandora's Box, upsetting the certainty of all aspects of the decree.

Arizona v. California, 460 U.S. at 619, 625. Here, these same concerns loom large. Absent passage of Section 6, finality will never be achieved where race or gender conscious relief is part of a consent decree.

The importance of affirmative action consent decrees or orders is well-demonstrated by the situation of Birmingham. Prior to the institution of court-ordered affirmative action in the Fire and Police Departments, only 28, or 5% of the City's Police officers were black, despite the fact that the department had been hiring blacks for 10 years. The Fire Department had hired its first blacks in 1968; by 1976, only 8 of the Department's 437 firefighters were black. There is reason to believe that these abysmal hiring rates would have continued absent the affirmative action provided by Judge Pointer's court-ordered affirmative action commencing in 1977, and the continued affirmative action contemplated by the 1981 Consent Decrees. With respect to ranking officers in those departments, there is every reason to believe that few blacks would have attained the ranks of police sergeant or fire lieutenant, and no blacks would have attained higher ranks. Absent the Decree, middle and upper managerial positions in the classified service would continue to be a domain limited almost exclusively to whites. I trust you will join me in

concluding that such an unacceptable result would not be attributable to some innate deficiencies or defects inherent in blacks.

Under the Decree, we have made important inroads in eradicating the pernicious effects of discrimination. While the upper echelons of the classified service remain predominately white, the City work force now approximates the composition of the county labor force in many of its entry and mid-level positions.

The Consent Decree has been operating smoothly and, with exception of the extraordinary difficulties fostered by the litigation--a new claim is filed on each occasion a black is promoted--there have been no significant problems with it. It was negotiated and recommended by outside labor lawyers and the Justice Department, it was approved by the Mayor and the (predominantly white) City Council, the duly elected officials of the City, and was found to be lawful, in the face of challenge, by a United States District Judge. Most knowledgeable and sensitive persons understand and accept the Decree. For the first time in the history of the City barriers to public employment and promotion have been effectively removed for women and minorities.

The lawsuits challenging the consent decrees have, however, placed a terrible financial burden on the City. Over the course of these eight years, the City has paid in excess of a million dollars in attorneys' fees to defend the Decree imposed by the Justice Department.[9] City personnel have devoted hundreds of hours, and suffered substantial

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[9] With regard to attorneys' fees, the City is alarmed at the prospect of increasing its financial burden with the possibility under Section 9, of paying the fees of the black intervenors defending the Decree. Unlike many cities, which have joined white plaintiffs in seeking to vitiate consent decrees, Birmingham has steadfastly defended its own Decree and at great expense. In our case, it is surely the perfidious Justice Department that ought

disruption, in working with the City's counsel in connection with the litigation. This burden of time and expense is staggering to a City with shrinking resources and expanding needs. We can all agree that those resources, both human and monetary, would have been far better employed to provide services and assistance to Birmingham's citizens. Certainly, the money spent could have been more effectively used to fund badly needed jobs for blacks and whites, women and men, better to serve the needs of all Birmingham residents.

The litigation has also fostered continued conflict and morale problems among City employees. In my experience, the uncertainty attending litigation can cause more trauma and unrest than the issue being litigated. I am told, for example, by my colleagues in cities with affirmative action plans, but without litigation, that any initial conflict is quickly dispelled as employees grow accustomed to, and reach an understanding of, the system. The eight years of litigation have prevented that acquiescence and understanding from visiting our city.

The controversy engendered by the litigation, and the publicity attendant to it, have caused disquiet among the citizenry, and created doubts about the quality of City services. The self-serving criticism by white employees of their black co-workers is obviously detrimental to the City. The fact is that my department heads, black and white alike, have reported that the blacks promoted pursuant to the Decree have served capably and admirably. The accusations which necessarily fly--in both directions--during litigation are generally inaccurate and unquestionably counterproductive. This is yet another diversion of resources from legitimate goals.

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to be liable for fees.

Finally, the litigation can only serve to discourage the eradication through voluntary affirmative action of discrimination in the private sector in and around Birmingham. The City's experience is certainly not one employers would wish to undergo, no matter how committed they may be to equal employment opportunity. If the City is subjected to eight years and more of litigation for compliance with a Justice Department initiated and court-approved consent decree embodying an affirmative action plan, what might private employers expect to encounter by implementing a plan never sanctioned by a court? The rule enunciated in *Martin v. Wilks* not only eviscerates the important public policies to which I alluded above, but also creates its own panoply of problems for the employer that seeks in good faith to remedy discrimination and its effects and comply with the proper orders of the federal courts.

Nor is the problem one that is isolated to Birmingham, Alabama. I am informed by the Lawyers Committee for Civil Rights Under the Law that *Martin v. Wilks* has engendered reverse discrimination litigation generally, and attacks on consent decrees specifically, against a number of public and private employers. *Martin v. Wilks* has resurrected litigation in Albany, Georgia, Gadsden, Alabama and Cincinnati, Ohio. One or more new suits have been filed, pursuant to *Martin v. Wilks*, in Jefferson County, Alabama, Boston, San Francisco, Oakland, Cincinnati and Toledo. Undoubtedly, there will be more. Without question, the experience of the City of Birmingham will lead other employers, public and private, to eschew redress of discrimination and its effects. For few people is the dream of true employment opportunity for blacks, women and other minorities strong enough to overcome the barriers and burdens created by the certain, extensive and expensive litigation now blessed by *Martin v. Wilks*.

We are not here seeking a license to engage in unlawful reverse discrimination. We are not here seeking to gag the objections, legitimate or otherwise, of white employees to affirmative action. We certainly do not seek to deprive anyone of their constitutional right to an opportunity for a day in court. We are here to seek provision for harmonizing the right to a day in court, the right to object to affirmative action, and the right to be free from illegal reverse discrimination, with the right of blacks to have discrimination redressed, and its effects eradicated, the right of employers to achieve repose and finality in litigation, and the right of men and women of all colors to have controversy resolved and laid to rest. I believe the Act under consideration will harmonize those rights.

Birmingham is a city striving to overcome the effects of a long and contemptible history of egregious racial discrimination. This just cause has unexcusably cost the taxpayers of Birmingham a tremendous amount of money, and under *Martin v. Wilks*, can be expected to cost much more. We ask you to ensure that this injustice will not be repeated or perpetuated.

The CHAIRMAN. Mr. Fitzpatrick.

Mr. FITZPATRICK. Mr. Chairman, may I pass to Mr. Henson first?

The CHAIRMAN. Surely. Mr. Henson.

Mr. HENSON. Mr. Chairman, I am James Henson, an employe of the Birmingham Fire and Rescue Service. I am also a plaintiff in the case which is called *Martin* v. *Wilks* in the U.S. Supreme Court of the United States.

I believe that racial discrimination is wrong no matter who it is directed against. I sued the City of Birmingham because I was denied a promotion on the basis of my race. I am pleased that the U.S. Supreme Court has ruled that I am entitled to a day in court. I urge this committee not to take away my opportunity to show that I have been discriminated against.

I joined the Birmingham Fire Department in 1976. At that time, blacks had been in the department for several years. I am not responsible for any wrongs that may have occurred before or since that time.

I had previously been the chief of a small suburban fire department but wanted to join a large department where my opportunities would be greater. I worked hard and earned a 2-year college degree in fire science and became a qualified paramedic.

In 1983, I spent months studying for a promotional exam, and out of over 100 people who took the test, placed No. 6 on the list. When the Chief interviewed me for a promotion, he said that I would not be promoted because I was white. The Chief said that he had no choice in the matter because 50 percent of the promotions had been set aside for blacks under the consent decree the city had entered into 2 years earlier.

Carl Cook, the black firefighter who got my promotion, as shown on the chart which is attached to my statement, was ranked No. 85, while I was No. 6 on the list. Mr. Cook had been in the department 9 years, while I was only there 6, so he had more seniority points than I did.

Mr. Cook was not a qualified medic, had no fire science degree, had never worked as the lead worker or acting officer and had no prior firefighting experience. I had all of these qualifications. Despite my better qualifications and starkly higher test scores, the fire chief told me I would not be promoted because I was not black.

Moreover, Mr. Cook was never identified as a victim of past discrimination, but received preferential treatment solely due to his race.

Finally, several years later, I received my promotion to lieutenant and thereafter I was promoted to captain. During those years prior to promotion, my career was on hold, and I lost pay and seniority solely due to my race. Aside from these tangible losses, this has been a demoralizing experience for me and my family.

I am a working class man. I am not responsible for any past discrimination by the City of Birmingham. I did not cause any discrimination and should not have to pay the price for it. The City of Birmingham should pay the price for its own wrongs. I am not a lawyer, but I think I can tell when I have been treated unfairly.

Mr. Chairman, all I am seeking is a day in court to show I am a victim of unlawful discrimination. I filed suit promptly after I was denied a promotion. I had no knowledge of the details of the litiga-

tion which resulted in the consent decree. If I get my trial and appeal and the Courts find that the city's conduct was legal, I can accept that and know that in America everyone is entitled to a day in court. What I cannot accept is having the city's agreement shoved down my throat with no opportunity to a full and fair trial to show that this is wrong.

Thank you.

The CHAIRMAN. Thank you, Mr. HENSON.

[Information submitted by Mr. Henson follows:]

CASE NUMBER: CV84-P-0903-S

DATE: DEC 16, 1985

PLAINTIFF'S EXHIBIT NUMBER 187

COMPARISON OF FIREFIGHTER JAMES HENSON
WITH FIREFIGHTER CARL COOK
AS OF AUGUST 1983

Name	A. Raw Score 1/	B. Converted Score	C. Final Score	D. Rank on Register	E. DFHS Seniority (as of 8/83)	F. Highest Formal Station Assignment	G. Certified for Assistant Driver or Driver	H. Months as Medic or Leadworker (as of 8/83)	I. Shifts as Acting Officer (as of 8/83)	J. Educational Pay Incentive	K. Other Firefighting Experience
James W. Henson	192 2/	93.06	99.06	6	6	Medic	June 1978	22	2	A.A.S. in Fire Science EMT III	Hillview Fire Department - 3 years, firefighter, captain deputy chief, and chief
Carl Cook	122 2/	71.61	81.61	85	9	Assistant Tillerman	—	0	0	—	—

1/ Total number of possible correct answers on the March 1983 fire lieutenant examination: 217.

2/ The probability of observing such a disparity in scores, if the true score of Henson was within 4 standard errors of measurement of that of Cook, is .05 or less. Hence, these results are highly statistically significant using normal statistical standards and one must conclude that the true score of Henson exceeds the true score of Cook by at least 4 standard errors of measurement.

The CHAIRMAN. Mr. Fitzpatrick.

Mr. FITZPATRICK. Thank you, Mr. Chairman.

I am Raymond Fitzpatrick of Birmingham, AL. I represent the nonminority firefighters of the Birmingham Fire and Rescue Service in *Martin* v. *Wilks*. Thank you for the opportunity, Senators, to comment on section 6 of S. 2104.

Martin v. *Wilks* was a correct decision which Congress should leave undisturbed. The U.S. Supreme Court reaffirmed the fundamental principle of due process that all Americans are entitled to a day in court when they believe they have been wronged. I wish to make it clear that *Martin* v. *Wilks* is a decision designed to further the due process guarantees embodied in the Constitution, and any legislative action in this area must meet due process scrutiny. Those who claim that the U.S. Supreme Court was merely interpreting the Rules of Civil Procedure are wrong.

The U.S. Supreme Court quoted Justice Brandeis when it held that it is a principle of general application in anglo-American jurisprudence that one is not bound by a judgment in a litigation in which he has not been designated as a party by service of process.

The Court recognized that this fundamental due process principle was incorporated into the Rules of Civil Procedure by the permissive language of rule 24 governing intervention and the mandatory joinder provisions of rule 19. It is a principle which, both as a matter of due process and fundamental fairness, Congress should not disturb.

The fairness of this principle, Mr. Chairman, is demonstrated by the facts of the Birmingham litigation where the nonminority firefighters filed both lawsuits challenging the quota plan and a motion to intervene in the consent decree litigation.

In 1975, the United States filed suit against the City of Birmingham and the Personnel Board. The city faced a potential back pay claim of $5 million, but rather than wait for a ruling from the courts, in 1981 the city secretly negotiated a consent decree in which it agreed to 50 percent quotas for promotions to fire lieutenant, quotas for all other jobs with the City of Birmingham, and paid only $265,000 to the victims of past discrimination.

Mr. Arrington in his deposition described this arrangement as the "best business deal" the city had ever made, and indeed it was, for the city settled the case on the backs of innocent nonparties who themselves were not guilty of committing any discrimination.

The Firefighters Association appeared at the District Court's Fairness Hearing to oppose the quotas and urge the court to require participation by the nonminority employees in the settlement process. In addition, before approval of the decree, the Firefighters Association and two of its members moved to intervene so they could contest the legality of the proposed decree. We sought our day in court as parties before the decree was entered, but at the urging of the Lawyers Committee and the City of Birmingham, the District Court refused to allow intervention, claiming we were 5 years too late.

The firefighters appealed from the denial of intervention. But the Lawyers Committee and the City again told the Eleventh Circuit that we should not be allowed to intervene because we were free to file separate litigation to challenge the city's actions.

Mr. Chairman, I would like to place in the record the briefs which they filed with the Eleventh Circuit, making those points, opposing intervention.

The CHAIRMAN. They will be so included.

[Documents follow:]

Nos. 87-1614, 87-1639, 87-1668

In The

Supreme Court Of The United States

October Term, 1988

JOHN W. MARTIN, *et al.*,
Petitioners,

v.

ROBERT K. WILKS, *et al.*,
Respondents.

PERSONNEL BOARD OF JEFFERSON COUNTY, *et al.*,
Petitioners,

v.

ROBERT K. WILKS, *et al.*,
Respondents.

RICHARD ARRINGTON, JR., *et al.*,
Petitioners,

v.

ROBERT K. WILKS, *et al.*,
Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENTS ROBERT K. WILKS, *et al.*

RAYMOND P. FITZPATRICK, JR.
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i

QUESTION PRESENTED

Whether the discrimination claims of unconsenting non-minority employees should be dismissed as impermissible collateral attacks if the employer claims to act pursuant to a consent decree which contemplates race conscious employment decisions.

ii

PARTIES TO THE PROCEEDINGS BELOW

Private Plaintiffs

Robert K. Wilks
James A. Bennett
Birmingham Association of City Employees
Charles E. Carlin
Ronnie J. Chambers
Floyd E. Click
Joel A. Day
Lane L. Denard
John E. Garvich, Jr.
Dudley L. Greenway
James W. Henson
Gerald L. Johnson
Danny R. Laughlin
Robert B. Millsap
James D. Morgan
Gene E. Northington
Carlice E. Payne
Howard E. Pope
Vincent J. Vella
Phillip H. Whitley
Marshall G. Whitson
David H. Woodall

Plaintiff-Intervenor

United States of America

City Defendants

Richard Arrington, Jr.
City of Birmingham

Personnel Board Defendants

Personnel Board of Jefferson County
Roderick Beddow, Jr.
Joseph W. Curtin
James W. Fields
Patricia Hoban-Moore
James B. Johnson
Henry P. Johnston
Hiram Y. McKinney

Defendant-Intervenors

John W. Martin
Sam Coar
Major Florence
Charles Howard
Ida McGruder
Eugene Thomas
Wanda Thomas

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STATEMENT

Respondents Robert K. Wilks, *et al.* are fifteen individual white male employees of the City of Birmingham Fire & Rescue Service ("BFRS") and one white male employee of the City of Birmingham Engineering Department.[1] Pet. App. 82a.[2] Each would have been promoted to a position as a Fire Lieutenant, Fire Captain or Civil Engineer but for the race conscious conduct of the City of Birmingham ("City"). Pet. App. 79a, 105a. The respondents filed individual suits against the City, Mayor Richard Arrington, Jr., and the Personnel Board of Jefferson County ("Board")[3] under Title VII and the Equal Protection Clause.[4] The defense to these suits was premised upon a claim of compliance with consent decrees entered in litigation to which respondents were not parties. Pet. App. 37a-38a.

A. The Consent Decree Cases.

During 1974 and 1975, racial discrimination suits were filed in the United States District Court for the Northern District of Alabama by the United States, by the Ensley

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[1]In addition, an association of employees of the City is a plaintiff-respondent. Pet. App. 67a.

[2]The form of citations is as follows: the Appendix to the Petitions for Certiorari is cited as "Pet. App."; the Joint Appendix is cited as "J.A."; exhibits to the 1985 trial are cited as "PX" (plaintiffs' exhibits) or "DX" (defendants' exhibits); the transcript and exhibits from the 1979 trial were admitted in the 1985 trial (*see* J.A. 403-08) as DX 1979 and DX 1980 and are cited as "1979 trial PX" or, for the trial transcript, "[month] 1979 tr."; and the record in the Court of Appeals is cited as "R[volume]-[document number]-[page]".

[3]The Personnel Board is an independent entity created by Act No. 248 of the 1945 Alabama Legislature, as amended. PX 1; R1-27. It administers a civil service and merit system for public employees of the City, Jefferson County and other municipalities in the county. The Board administers examinations for entry level and promotional positions in the BFRS, and ranks employees for consideration by the City on the basis of test scores and seniority. J.A. 429-435, 553-554.

[4]Claims under 42 U.S.C. § 1981 and state law were also alleged. The suits were filed within the statute of limitations following the denial of promotional opportunities to the individual plaintiffs. Each plaintiff exhausted administrative remedies before the Equal Employment Opportunity Commission. PX 425-454, R1-40.

Branch of the NAACP, and by a class of blacks which included petitioner John W. Martin. Pet. App. 3a-4a. The complaints charged that the City, the Board, Jefferson County and numerous other municipalities had engaged in employment practices resulting in unlawful discrimination against blacks and women. Pet. App. 236a-237a. The district court consolidated the suits and severed the issues for separate trials pursuant to Rule 42, F.R.Civ.P. Pet. App. 4a-5a.

At issue in the first trial was whether the Board's use of entry-level Office Worker, Firefighter and Police Officer examinations unlawfully discriminated against blacks. The district court found that the Board's use of the Firefighter and Police Officer tests violated the Title VII rights of blacks; no violation of law was found in the use of the Office Worker test. J.A. 553-599. Citing the good faith voluntary efforts of the Board to administer nondiscriminatory tests and affirmatively to recruit blacks for public employment, the district court rejected the claims of the plaintiffs under the Equal Protection Clause of the Fourteenth Amendment.[5] J.A. 556-557. As a remedial device, the district court ordered the Board to comply with a short-term referral quota and thereafter achieve a goal of referral of blacks for entry-level

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[5]The assertion of *amici* NAACP Legal Defense and Education Fund, *et al.* br. 7 n.9, that Birmingham is a recalcitrant employer of the sort found in *United States v. Paradise*, 480 U.S. 149 (1987) and *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986) is baseless. In 1977, the district court noted that the Martin plaintiffs and the United States had failed to prove intentional discrimination and rejected their constitutional and § 1981 claims. J.A. 556-557. The City consent decree made note of the good faith efforts of the City to comply with the civil rights statutes through adoption of fair hiring ordinances and the adoption of voluntary affirmative action plans. Pet. App. 123a, 124a. Petitioner Richard Arrington, Jr., the first black Mayor of Birmingham, has served as Mayor since 1979 and has long supported preferential treatment for blacks. PX 403, R1-20. A majority of the citizens of Birmingham and a majority of its city council members are black. Indeed, Birmingham's affirmative action policies have resulted in two challenges to its minority contractor set-aside ordinances. *See, Arrington v. Associated General Contractors*, 403 So.2d 893 (Ala. 1981), *cert. denied*, 445 U.S. 913 (15% set-aside struck down); *Associated General Contractors v. City of Birmingham*, CV-77-506-014-WAT (Cir. Ct. Jefferson County, Ala.) (pending challenge to City's current 35% set-aside for black contractors).

Firefighter positions based on applicant flow. J.A. 588-589. The district court's findings, in relevant part, were upheld on appeal. *Ensley Branch of the N.A.A.C.P. v. Seibels*, 616 F.2d 812 (5th Cir.), *cert. denied*, 449 U.S. 1061 (1980). Many blacks were thereafter hired, long before entry of the consent decrees. J.A. 438. Vacation of that order has not been sought.

A second trial was held in August and October, 1979. At issue were eighteen additional tests and various other screening devices and rules used by the Board. Pet. App. 237a. Fire Department promotional examinations were not attacked. J.A. 594-595. As in the first trial, the City did not participate, and the independent claims against the City were never tried. Pet. App. 16a, 237a; J.A. 762.

Prior to the court's decision in the second trial, counsel for the parties in the *Jefferson County* litigation engaged in lengthy, secret negotiations which resulted in the City and Board Consent Decrees. Pet. App. 237a; J.A. 520-522. These decrees were tendered to the district court judge and provisional approval was entered on June 8, 1981 in summary fashion. J.A. 694-696. The district court found the consent decrees to be "fair, reasonable and lawful settlements." The court approved the consent decrees "subject to further hearings" and the consideration of "any objections which may be filed and presented at a fairness hearing in accordance with the procedures explained below." J.A. 695.[6] It was further ordered that notice be given to all "interested persons." However, adequate notice was not given to the employees of the BFRS sufficient to indicate that their promotions would be adversely affected.

A public statement was published in the classified section of the *Birmingham News* on June 14 and 21, 1981. The

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[6]The district court's June 8, 1981 Order provided the following procedure for the presentation of objections:

> All objections to the Consent Decrees must be filed in writing with the Clerk of the Court by July 14, 1981. The Clerk shall forward copies of any such objections to counsel for the parties to the Consent Decrees as they are filed. A fairness hearing will be held on August 3, 1981 at 9:00 a.m. in Courtroom 2.

J.A. 695-696.

contents of the statement were materially different from a much more detailed notice mailed to minority employees and to black class members. In relevant part, the published statement provided that the "Consent Decrees contain a number of general injunctive provisions, including goals for blacks and women, each of which are designed to correct for the effects of past discrimination and to insure equal opportunities for all applicants and employees with the City and in the civil service system administered by the Personnel Board." Pet. App. 174a. While the statement addressed the appropriate relief to be granted with respect to alleged Fire Department hiring discrimination through the Board's test, Pet. App. 172a, nothing in the published statement indicated that BFRS promotional goals were to be included in the consent decrees. Significantly, the notice which was mailed to black employees included copies of the entire consent decrees, Pet. App. 144a, and a different notice explaining in detail the long-term and interim annual promotional goals and quotas in the BFRS. Pet. App. 180a-189a. The decrees made no provision for posting in the workplace.

The public statement required that written objections were to be filed by July 14, 1981. The statement did not say whether evidence would be taken at the fairness hearing and failed to outline the procedure which would be followed at the hearing. Pet. App. 171a-175a.

The litigation did not have the notoriety that petitioners suggest. While BFRS Chief Gallant knew that the litigation was pending, he did not know that Fire Department promotions might be at issue. J.A. 452. The City consent decree was negotiated secretly by the City's attorneys, who were in communication with the Mayor. After the decree was negotiated, Council approval was sought for the backpay provision whereby the City settled massive backpay claims for a total backpay liability of only $265,000. Mayor Richard Arrington, Jr. testified that he certainly did not oppose committing the City to the injunctive provisions of the decree, and in view of the meager backpay award and receipt of tools to prefer blacks in employment, deemed the entire

matter to be "the best business deal [the City] had ever struck." J.A. 520-527.

In accordance with the procedure for objections dictated by the district court, the Birmingham Firefighters Association (BFA) and its President filed written objections and appeared at the fairness hearing through the undersigned counsel of record. J.A. 699-713; 732-740. At the August 3, 1981 fairness hearing, the BFA announced that it would promptly move to intervene in order to continue to protect and assert its interests. J.A. 730. The district court responded that a motion to intervene would be denied as untimely given the passage of a lengthy period of time since the trial on the entry-level Firefighter test. J.A. 771. At the close of the hearing, the court announced that it would receive additional briefs until August 5, 1981. J.A. 770.

On August 4, 1981 the BFA and two of its members filed a motion to intervene as of right under Rule 24, F.R.Civ.P. J.A. 774-776; Pet. App. 6a. The movants were Billy Gray, a white male Fire Lieutenant, Tommy Sullivan, a white male Firefighter, and the BFA. Movants sought to intervene both individually and as representatives of the "presently-employed firefighters of the City of Birmingham." J.A. 774. Movants represented that they "desire to intervene in this action solely for the purpose of contesting the legality of the proposed consent decrees" and that they had been unaware of the ongoing secret settlement negotiations. J.A. 773. *See also,* Pet. App. 237a (court aware of ongoing negotiations). On August 5, 1981, the BFA filed, in timely fashion, a supplemental memorandum which noted that intervention was sought in order to "preserve [movants'] rights to object to the provisions of the Decrees." J.A. 781.

The district court entered an order approving the consent decrees on August 21, 1981. Pet. App. 247a-249a. The court's accompanying opinion rejected all objections to the consent decrees[7] and approved the settlement under the

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[7]The court justified the BFRS promotional goals on the 1977 findings of entry level discrimination. Pet. App. 244a. The Eleventh Circuit, in its 1985 opinion, questioned the validity of a rationale that such findings required adoption of promotional goals and quotas. Pet. App. 19a.

"reasonableness" standard.[8] In addition, the district court found the motion to intervene to be untimely since "[t]he litigation has been pending for over five years and has been vigorously contested by the existing parties through two trials and one appeal." Pet. App. 246a.

A timely appeal was filed by the BFA in which it sought to overturn the denial of its motion to intervene. *United States v. Jefferson County*, appeal no. 81-7761 (11th Cir.). In addition, the BFA sought reversal of the approval of the consent decrees.[9]

The United States Court of Appeals for the Eleventh Circuit found that the district court did not abuse its discretion by denying intervention to the BFA and its members in the consent decree case. *United States v. Jefferson County*, 720 F.2d 1511 (11th Cir. 1983); J.A. 149-161. The appeals court found that the President of the BFA had been aware of the litigation and that no existing party then represented its interests. J.A. 154-155. In addition, the court held that intervention following the announcement of the decrees would "have plainly prejudiced the existing parties since it would have nullified these negotiations . . . " J.A. 155. Finally, the court found that the BFA and its members would suffer no prejudice by a denial of intervention since individual firefighters were free to "institut[e] an independent Title VII suit, asserting the specific violation of their rights." J.A. 158. The Eleventh Circuit expressly rejected the "impermissible collateral attack" doctrine followed by other

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[8]This Court rejected the "reasonableness" standard for approval of a public employer's affirmative action plan in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). In addition, the district court noted that the decree might not correspond with the findings of discrimination it would have made or the remedial relief it would have ordered had it completed the decision that was being drafted. Pet. App. 246a.

[9]*See*, Brief of Appellant, *United States v. Jefferson County*, appeal no. 81-7761 (11th Cir.). The appeals court, upholding the denial of intervention, did not reach the legality of the decree provisions. J.A. 149-161.

circuits and advanced by petitioners here,[10] and noted that its decision parallelled the analysis of *Ashley v. City of Jackson*, 464 U.S. 900 (1983) (Rehnquist, J., joined by Brennan, J., dissenting from denial of *certiorari*). J.A. 156-159.

B. **The Reverse Discrimination Litigation.**

While the appeal from the denial of intervention was pending, the first of the individual respondents' complaints was filed on April 14, 1982. Pet. App. 110a (*Bennett v. Arrington*, number CV-82-P-0850-S (N.D. Ala.)). Respondents sought preliminary and permanent injunctive relief against race-conscious promotions which respondents claim violated Title VII, the Equal Protection Clause of the Fourteenth Amendment, § 1981 and Alabama state law. Pet. App. 112a-116a. The *Bennett* respondents also alleged that the City and the Board were unlawfully promoting employees on a racial basis under the "assumed protection of consent settlements . . . " Pet. App. 113a. The *Bennett* respondents' application for preliminary relief, J.A. 35-39, was denied after an oral hearing on the question whether the provisions of the consent decrees required the challenged race-based promotions. J.A. 49-86. The Martin petitioners intervened and claimed the suit was an impermissible collateral attack on the consent decrees and was, therefore, due to be dismissed. J.A. 78-79. An appeal was taken from the denial of the preliminary injunction, J.A. 48, which the Eleventh Circuit consolidated with the appeal from the denial of the BFA's motion to intervene in the consent decree case.[11] J.A. 149.

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[10]The petitioners, who were all parties to the *Jefferson County* appeal, at no time sought review by this Court, and should be estopped in their attempts to relitigate the decision that respondents are not bound by the decrees and may pursue their independent claims of discrimination against their employer. Indeed, it was in reliance on that decision against petitioners that these cases have been vigorously pursued.

[11]The Eleventh Circuit affirmed the denial of preliminary relief in *Bennett*. Appeal no. 82-7129 (consolidated with *U.S. v. Jefferson County*), J.A. 149-161. The court found that respondents failed to show irreparable injury, a necessary requirement for preliminary relief, and could be made whole through awards of backpay, remedial seniority and mandatory promotion should they prevail at a hearing on the merits. J.A. 160-161.

Following the initiation of the *Bennett* complaint, other white male City employees filed discrimination complaints in the United States District Court for the Northern District of Alabama, the same district court which had entered the consent decrees. J.A. 93 (*B.A.C.E. et al. v. Arrington*), 130 (*Wilks, et al. v. Arrington*). The various complaints were consolidated, pursuant to an agreement between the judges of the district court, J.A. 210, in a single case file captioned *In re: Birmingham Reverse Discrimination Employment Litigation*, J.A. 218. The cases were assigned to Judge Pointer, the same judge to whom the first reverse discrimination case had been assigned and the judge who had entered the consent decrees.

The petitioners promptly sought dismissal of these cases claiming that they constituted impermissible collateral attacks on the consent decrees. J.A. 220-224. On May 14, 1984, the district court refused dismissal. The court then held that the plaintiff-respondents had to prove that the provisions of the consent decrees did not require the challenged race-based promotions. The court determined that the only factual issue was whether, under the terms of the City consent decree, the black promotees were demonstrably less qualified than the respondents. Paragraph 2 of the City decree provides: "Nothing herein shall be interpreted as requiring the City to . . . promote a person who is not qualified, or to . . . promote a less qualified person in preference to a person who is demonstrably better qualified based upon the results of a job related selection procedure." Pet. App. 124a. The City contended that paragraph 2 had never been "invoked," was therefore irrelevant, and was not considered in making promotions. Indeed, the City admitted, and the district court found, that the City promoted the black candidates without consideration of the relative qualifications of all the candidates. Pet. App. 105a. In addition, the district court required that the respondent plaintiffs prove that the City knew at the time of promotion that the black promotees were demonstrably less qualified. Pet. App. 28a, 29a; J.A. 237.

The district court held further that respondents could not

challenge the lawfulness of the consent decrees.[12] Consequently, the question whether the race-based promotions were permissible under Title VII and the Equal Protection Clause was eliminated and the case limited to the inquiry whether the consent decrees mandated the challenged promotions.[13]

A five-day bench trial was held in December 1985 at which respondents, in accordance with the pretrial orders of the court, demonstrated that the consent decrees did not mandate the challenged actions because of the disparities in qualifications of the competing black and white candidates. The relative qualifications of each black and white candidate were proven by using simple, objective criteria summarized by chart exhibits. J.A. 487-501. In addition, respondents offered the test scores of the competing candidates, and expert testimony of the statistical disparities in those scores. Pet. App. 87a-91a. Respondents submitted deposition testimony of the BFRS Fire Chief, the BFRS Deputy Chief, and the City's Chief Personnel Affirmative Action Officer which

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[12]The transcript reflects the following from the May 14, 1984 hearing on the motions to dismiss:

> MR. JOFFE: In essence, your honor, saying it is not open as an issue as to whether the decrees are per se unlawful or whether the decrees are unlawful in some other ways. You seem to be saying that you will hold that the decrees are unlawful. [sic — counsel obviously said "lawful"]
>
> THE COURT: That is correct. That is an issue, as I view it, the Court of Appeals did not decide but then it still is a question of lawful in the sense that the mandated aspects of the Decree may be carried out without liability. As I understand the Court of Appeals' decision, that is a permissible conclusion to be reached with their decision.

J.A. 250-251. *See also* J.A. 281. The Martin petitioners representation that validity of the decrees was an issue for trial, Brief at 11, is false.

[13]*See* J.A. 277-291 (district court's interim opinion dated Feb. 18, 1985 finding that defendants may prevail if they "establish that the challenged promotions were made because of the consent decree," J.A. 280). Thereafter, the district court strictly supervised and limited pretrial preparation in accordance with its position and instructed respondents to try their case in four days. *See* J.A. 329, 340-355. In addition, in its Feb. 18, 1985 Opinion, the district court again summarily held valid the "affirmative action aspects of the decrees regarding . . . promotion of blacks . . . " J.A. 281.

positively demonstrated that the City at no time considered the relative qualifications of the black and white candidates and issued promotions strictly on a one-for-one racial basis without regard to relative qualifications. J.A. 453-477; 502-514.[14]

The defense consisted mainly of the trial records of the 1976 and 1979 trials offered by the City "not for the truth of any matter asserted" in those records but "simply [to show] what was before the Court and the parties to the consent decree at the time it was entered." J.A. 403; DX 1977, 1978-A, 1979, 1980-A. The Court received the records on that limited basis with respect to the Wilks respondents only. J.A. 405-406. The respondents did not attempt to contest this record information since it was beyond doubt that such a record "was before the Court and the parties to the consent decree at the time it was entered."

At the conclusion of the trial, the district court entered, with minor modification, proposed findings of fact and conclusions of law submitted by the defendants. Pet. App. 27a-66a. The court held that the City was permitted, pursuant to the consent decrees, to promote demonstrably less qualified persons on the basis of race without using any job-related selection procedure. Pet. App. 105a-108a. The court reiterated its earlier holding that the consent decrees were valid remedial devices and that the respondents "cannot collaterally attack the Decree's validity." The court explained that the "only avenue of attack open to the private plaintiffs is to show that the challenged action was not taken pursuant to the Decree." Pet. App. 61a-62a. The district court entered findings that neither plaintiff-respondents, nor their privies, were parties to the consent decrees, Pet. App. 70a, 75a, 105a; that, with one possible exception, none of the black promotees were victims of past discrimination; that while the challenged fifty percent goal was implemented

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[14]Notwithstanding the proviso of paragraph 2 of the City decree, p. 8, *supra*, the district court found that the City was permitted by its consent decree to ignore relative qualifications of prospective employees and therefore could use no job-related selection procedure. Pet. App. 105a-106a, 108a.

the relevant labor pool for Fire Lieutenant candidates was between nine and thirteen percent black, Pet. App. 105a-106a; and that but for their race each respondent would have been promoted and the City had made no effort to use a job-related selection procedure in evaluating promotional candidates, Pet. App. 105a-106a.

C. The Decision Of The United States Court Of Appeals For The Eleventh Circuit In The Reverse Discrimination Litigation.

Respondents Wilks, *et al.* appealed to the United States Court of Appeals for the Eleventh Circuit. That court reversed and remanded. *In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492 (11th Cir. 1987); Pet. App. 3a-26a.

On appeal, respondents claimed that the district court had erroneously required them to prove that the challenged promotions were not made pursuant to the consent decrees and had improperly bound them to the terms of the decrees. In addition, respondents demonstrated that the petitioners' conduct was not within the purview of lawful affirmative action and the district court's findings that the City's conduct was mandated by its consent decree was clearly erroneous.

Relying on this Court's decision in *Local No. 93 v. City of Cleveland*, 478 U.S. 501, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986), the Eleventh Circuit held that "even if a consent decree purports to affect the rights of third parties, those parties are not bound by the terms of the decree unless their interests were adequately represented by a party to the decree." Pet. App. 14a. Reviewing its earlier decision on the appeal from the intervention proceedings, the court noted that respondents were not parties to the decrees and their claims did not accrue until "after the decrees became effective and the challenged promotions were made." Pet. App. 15a. The Eleventh Circuit further added that there was no other factor justifying preclusion: "the individual plaintiffs [did not] have an identity of interest with a party to the consent decrees that they should be treated as parties for preclusion purposes." Pet. App. 15a. After carefully consid-

ering the time at which respondents' claims arose, its earlier decision precluding the BFA's attempt to intervene several weeks before the settlements were approved, and the voluntary nature of the affirmative action plan embodied in the consent decree, the Eleventh Circuit held that the respondents should not be bound by the consent decrees.[15]

Since the district court had incorrectly bound these respondents to the provisions of the decrees, hence limiting the scope of the trial, the Eleventh Circuit directed the district court to try plaintiffs' discrimination claims under the standards provided in *Johnson v. Transporation Agency*, 480 U.S. ___, 105 S.Ct. 1442 (1987) (Title VII), and *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) (Constitution). Pet. App. 17a-19a. The court also stated that consideration of the defendants' conduct without giving any preclusive effect to the consent decrees is warranted under the facts of this case:

> The reasons for according a consent decree no more weight than a voluntary affirmative action plan when the consent decree is offered as justification for a race conscious employment decision are especially strong where, as here, vitally interested parties are not parties to the plan incorporated into the decree. The City Decree does contain a provision — paragraph 2 — that facially serves to protect the interests of nonminority employees. In light of the district court's interpretation of paragraph 2, however, that protection is illusory at best. The district court's interpretation of the City decree permits the City to make race conscious promotions without using *any* job-related selection procedure. Given the natural potential that such an arrangement will trammel the interests of nonminority employees, we are compelled to the conclusion that the district court should subject the consent decrees to heightened scrutiny under the second prong of the *Johnson* analysis when it tries the individual plaintiffs' claims.

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[15]Judge Anderson filed a dissenting opinion which noted that while the employer should not be held liable if it believed it was complying with the decrees, he agreed with the opinion of the court to the extent that it permitted respondents to "challenge the consent decree prospectively and test its validity against the recent Supreme Court precedent." Pet. App. 24a.

Pet. App. 19a (emphasis in original). The other issues raised by respondents on appeal were therefore not considered by the Eleventh Circuit.

This Court limited its grant of certiorari to the narrow question of whether an action by a nonparty which implicates a consent decree entered in settlement of prior discrmination litigation must be dismissed as an "impermissible collateral attack."[16]

SUMMARY OF THE ARGUMENT

Throughout years of litigation — including extensive discovery, a complex trial, and two appeals — respondents have sought a meaningful opportunity to have their discrimination claims heard and considered by a federal court. Petitioners have continually sought to insulate themselves from liability claiming that their conduct was permitted by an affirmative action plan embodied in a consent decree, the validity of which they assert cannot be questioned. This Court granted *certiorari* to resolve the narrow issue of whether respondents may challenge the provisions of consent decrees which affect them and to which they are not parties in separate and subsequent litigation.[17]

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[16]The petitioners' assertion in the question presented by each petition that respondents "had notice and an opportunity to be heard" is patently wrong and contrary to both the 1983 and 1987 decisions of the Eleventh Circuit in this litigation. Indeed, the Eleventh Circuit held that the BFA's participation at the fairness hearing was not sufficient to make it a party to the decrees and respondents did not "implicitly" consent to the decrees. This is akin to a finding that there was no waiver of an opportunity to be heard. Pet. App. 15a.

[17]The Court's grant of *certiorari* was limited to the identically worded first question in each of the three petitions. 101 L.Ed.2d 881 (June 20, 1988). This question is the identical question which the Court failed to resolve in the preceding Term in *Marino v. Ortiz*, 108 S.Ct. 586 (1988). While it was undisputed that the *Marino* petitioners intentionally eschewed an invitation to intervene, 806 F.2d 1144, 1147, as demonstrated at Part I(C), *infra*, the premise of the question presented in the instant case that respondents "had notice and the opportunity to be heard before entry of [the] decrees" of the sort necessary to adjudicate their constitutional and statutory rights is strongly contested and simply not true.

In addition, petitioners also sought review of the extent of any "extra protection" a consent decree might provide (Personnel Board pet. i), the

As nonparties, respondents are not bound by the consent decrees and are at liberty to challenge the illegal voluntary conduct of their employer. Whether such conduct was taken pursuant to a consent decree is, in our view, of little consequence since a consent decree merely embodies a voluntary affirmative action plan. *See Local No. 93 v. City of Cleveland*, 478 U.S. 501, 106 S.Ct. 3063 (1986).

Binding nonparties to the provisions of a consent decree which they or their privies had no part in making violates fundamental notions of due process. *Hansberry v. Lee*, 311 U.S. 31 (1940); *Parklane Hosiery v. Shore*, 439 U.S. 322, 327 n.7 (1979). It is without dispute that respondents were not parties or privies to parties to the Birmingham consent decrees and no decree party represented the interests of the nonminority employees. Pet. App. 15a, 105a. Indeed, the collateral attack bar advocated by petitioners has no foundation in the decisions of this Court. *See Ashley v. City of Jackson*, 464 U.S. 900 (1983) (Rehnquist, J., joined by Brennan, J., dissenting from denial of *certiorari*).

This case comes before the Court in a unique factual context. Intervention was sought *before* entry of the consent decrees by the Birmingham Firefighters Association ("BFA") and two individual firefighters. J.A. 774-776. The City successfully opposed intervention claiming the BFA members had no standing to contest decree requirements and their application to intervene was untimely. J.A. 534-552. The Eleventh Circuit upheld the denial of intervention finding that no prejudice should accrue to the nonminority employees because they were free to institute independent suits asserting the specific violation of their rights after their

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scope of the nonparties' right to challenge the decree (Arrington pet. i), and the propriety of the Eleventh Circuit's instructions to the district court on remand (Martin pet. i). This Court denied review of these matters which will not therefore be addressed in this brief.

In view of the limited basis upon which review has been granted, respondents will not address the propriety of the provisions of the consent decrees, the sufficiency of the record of discrimination in the consent decree litigation, nor the legality of the challenged conduct as addressed at Martin br. 3-6, 38-39. *See also*, Arrington br. at 10 ("[n]o question concerning the propriety of race-conscious relief is before the Court.").

cause of action accrued. Any earlier claims would have been premature and speculative. J.A. 149-161. Respondents filed those suits, and petitioners now claim respondents are again wrong — they should have perceived their interests during the pendency of the consent decree cases and intervened. Such a shifting of positions to deny any opportunity to contest conduct related to a consent decree has been described as a judicial pincer movement on the due process rights of nonparties to litigation. Cooper, *The Collateral Attack Doctrine and the Rules of Intervention: A Judicial Pincer Movement on Due Process*, 1987 Legal Forum 155 (1987). The law is clear that persons not parties to litigation do not have an affirmative duty to intervene in litigation to which they have not been joined by the existing parties. *Chase National Bank v. City of Norwalk*, 291 U.S. 431 (1933). Moreover, a judicial rule, created pursuant to Rule 24, F.R.Civ.P., which terminates respondents' claims before they accrue impermissibly alters the statute of limitations in a manner contrary to the provisions of 28 U.S.C. § 2072.

Even if there is a duty to intervene, before individual Title VII and Constitutional rights are altered, nonparties are, at a minimum, entitled to adequate notice and a meaningful opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950). The Constitution places the burden to give adequate actual notice on the existing party through the exercise of "reasonable diligence." *Tulsa Professional Collection Services v. Pope*, 108 S.Ct. 1340 (1988). In this case, it is undisputed that petitioners made no effort to give individual actual notice to respondents, notwithstanding the fact that all were city employees when the decrees were approved. Through the exercise of reasonable diligence, individual notice by mail of the settlement and approval proceedings could easily have been provided. Moreover, the City's black employees were each mailed a detailed notice describing the consent decrees and the specific effect the decrees would have on Fire Service promotions together with a complete copy of the decree. Pet. App. 144a-147a. The statements published in the newspaper simply announced the filing of "a decree." Indeed, under

such circumstances, it is patently unfair for a court to terminate respondents' causes of action before they have accrued.

Petitioners argue that by permitting employers to negotiate consent decrees which will immediately nullify the rights of nonparties to file discrimination claims, they will further the objective of voluntary compliance with our nation's antidiscrimination laws. But, the collateral attack bar impermissibly strips nonparties of an adequate opportunity to assert their individual claims of unlawful discrimination. Permitting independent suits such as those filed by respondents furthers the important policy against the prospective waiver by others of the right of each individual to be free from unlawful discrimination. *See Wygant v. Jackson Board of Education,* 476 U.S. 267 (1986); *Alexander v. Gardner Denver Co.,* 415 U.S. 36 (1974). Moreover, preservation of the right of nonparties to sue will discourage employers from impermissibly shifting the burden of the past discrimination to innocent unrepresented employees through the settlement process. *W. R. Grace & Co. v. Local 759,* 461 U.S. 757 (1983). Employers will remain free to embody settlements in consent decrees and gain the benefit of judicial enforcement and supervision, but still be accountable to their employees for the consequences of actions which are not permissible remedial efforts.

A public employer's race-based conduct should be subject to the strict and searching scrutiny of adversarial litigation by the aggrieved parties, rather than the cursory review of facial "reasonableness" which the fairness hearing held in this case provided. While it is laudable to advocate settlement, voluntary compliance, and repose for litigants, such goals cannot be achieved at the expense of unrepresented parties.

Respondents suggest that two alternative approaches to the issue at hand fairly protect the rights of unconsenting nonparties while permitting employers to use consent decrees to achieve lawful objectives.

First, parties to a proposed consent decree may join potentially-affected persons as parties to the litigation under the mandatory joinder provisions of Rule 19, F.R.Civ. P.

Through this procedural device nonparties will receive adequate notice of the proposed decree through service of process, and will thereby be fully informed that a court is about to enter a judgment which may affect their rights.

As an alternative, should the district court or decree parties not see fit to join the potentially affected third parties to the litigation under Rule 19, Congress has determined through legislation creating reasonable statutes of limitation that injured parties must file suit within a definite period of time from the date upon which their injury accrues. It makes sound, logical and legal sense for injured parties to seek redress after they are in fact injured rather than to require the filing of protective motions to intervene by persons who may never suffer injury. Indeed, it makes even more sense to require a hearing on the claims of some fifteen similarly situated firefighters rather than to require the intervention of hundreds of rank-and-file firefighters who have the right to apply for promotion to the position of Fire Lieutenant. Rather than precipitate duplicative and unnecessary litigation, the channeling of the claims of actually affected persons (as opposed to potentially-affected persons) into a single proceeding is a prudent use of judicial resources, limiting the volume of litigation, while still pursuing the right of unconsenting parties to a meaningful hearing upon the merits with respect to the alleged illegal conduct.

It is clear that in the context of this case, where intervention was sought before entry of the decree and denied, respondents are entitled to challenge decree related conduct in these proceedings. Respondents request this Court to reject the collateral attack bar advocated by petitioners.

ARGUMENT

I. BINDING A NONPARTY TO A JUDGMENT IS VIOLATIVE OF FUNDAMENTAL DUE PROCESS RIGHTS.

A. A Consent Decree Cannot Bind A Nonparty.

It is a settled rule of preclusion law that a judgment is only binding on a party or its privies. *Ashley v. City of Jackson,* 464

U.S. 900 (1983) (Rehnquist, J., joined by Brennan, J., dissenting from denial of *certiorari*).[18] This rule expresses a fundamental notion of due process which ensures that the courts, as the guarantor of the legal and constitutional rights of all citizens, fairly and impartially provide all persons with a meaningful opportunity to be heard. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979); *Hansberry v. Lee*, 311 U.S. 32 (1940). There is no dispute that respondents are neither parties nor in privity with any parties to the consent decrees. Pet. App. 12a-13a, 105a. It follows that the consent decrees cannot and do not bind respondents and that they therefore ought to be free to sue a party to the decrees within the applicable statute of limitations.

In an effort to avoid this fundamental premise, petitioners claim that this Court should adopt the "no collateral attack" bar followed by some federal circuit courts,[19] though not the

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[18]This rule dates back to the opinion of Chief Justice Marshall in *Davis v. Wood*, 1 Wheat. 6, 8-9, 4 L.Ed. 22 (1816) ("everyone should have his own day in court"). *See also Baldwin v. Hale*, 68 U.S. 223 (1864) ("parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified"); *Windsor v. McVeigh*, 93 U.S. 274 (1876); *Litchfield v. Crane*, 123 U.S. 549 (1887); *Hovey v. Elliott*, 167 U.S. 409 (1897).

[19]Since a collateral attack typically involves an attack upon a judgment by a party against whom the judgment was rendered, the term is a misnomer. *See* Kramer, *Consent Decrees and the Rights of Third Parties*, 87 Mich.L.Rev. ___ (forthcoming in Nov. 1988).

The collateral attack doctrine first received judicial recognition in *Black and White Children of the Pontiac School System v. School District*, 464 F.2d 1030 (6th Cir. 1972) (school desegregation case). Thereafter, it appeared in the context of employment discrimination suits. *Prate v. Freedman*, 430 F.Supp. 1373 (W.D.N.Y.), *aff'd*, 573 F.2d 1294 (2d Cir. 1977); *O'Burn v. Shapp*, 70 F.R.D. 549 (E.D.Pa.), *aff'd*, 546 F.2d 417 (3d Cir. 1976), *cert. denied*, 430 U.S. 968 (1977); *Dennison v. City of Los Angeles*, 658 F.2d 694 (9th Cir. 1981) (all collateral burdens on a consent decree are per se impermissible); and *Thaggard v. City of Jackson*, 687 F.2d 66 (5th Cir. 1983), *cert. denied sub. nom. Ashley v. City of Jackson*, 464 U.S. 900 (1983).

The majority of commentators have criticized the no collateral attack doctrine, finding little persuasive analysis to support it. *See* Comment, *Collateral Attacks on Employment Discrimination Consent Decrees*, 53 Chi.L.Rev. 147, 153 (1986) (rationales for *Thaggard* cases applied "haphazardly and with little explanation"); Kramer, *Consent Decrees and the Rights of Third Parties*, 87 Mich.L.Rev. (Nov. 1988) ("Courts that enforce the collateral attack bar have ignored its due process implications."); Cooper, *The*

Eleventh Circuit, which prohibits and excludes any lawsuit which implicates a consent decree entered into pursuant to a settlement of pending Title VII litigation.

This Court has already rejected the rationale that underlies the collateral attack doctrine. In *Hansberry v. Lee*, 311 U.S. 32 (1940), the Court refused on grounds of due process to preclude black plaintiffs from contesting a racially-restrictive covenant which had been held valid in earlier litigation, noting that:

> It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has been made a party by service of process. . . . A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States . . . prescribe. . . .

Id. at 40. Indeed, this rule has been consistently applied by this Court in a variety of contexts. *See Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961) (Court upheld denial of intervention to contest provisions of government antitrust consent decree because nonparties would not be bound); *Blonder-Tongue Labs v. University Foundation*, 402 U.S. 313 (1971) (litigated antitrust case); *Sea-Land Services v. Gaudet*, 414 U.S. 573, 593 (1974) (admiralty wrongful death action); *McKinney v. Alabama*, 424 U.S. 669 (1976) (*in rem* obscenity proceeding); *W. R. Grace & Co. v. Local Union 759*, 461 U.S. 757 (1983) (E.E.O.C. conciliation agreement). *See also National Licorice Co. v. N.L.R.B.*, 309 U.S. 350, 366-367 (1940) (judgment in favor of the N.L.R.B. against an employer who contracted with individual nonparty employees in a manner violative of federal labor statutes did not affect the rights of such employees to enforce those contracts against employer); *Belknap v. Hale*, 463 U.S. 491, 510-512 (1983) (state action for

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Collateral Attack Doctrine and the Rules of Intervention: A Judicial Pincer Movement on Due Process, 1987 Legal Forum 155 (1987); Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987 Legal Forum 103 (1987); Mengler, *Consent Decree Paradigms: Models Without Meaning*, 29 Boston Col.L.Rev. 291, 332 (1988) (failure to consider "third parties' claim on clean slate . . . violates due process").

misrepresentation not precluded by federal labor law). *Cf.*, *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984) (individual claims of class members not litigated in unsuccessful class action not barred).

In the context of employment discrimination litigation, this Court recently refused to preclude nonminority employees from seeking redress for discriminatory practices taken pursuant to court orders. *W. R. Grace & Co. v. Local 759*, 461 U.S. 757 (1983) (Title VII); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) (U.S. Constitution). *See also Local No. 93 v. City of Cleveland*, 478 U.S. 501 (1986) (claims of nonconsenting intervenors remain even after entry of consent decree). In addition, many appeals courts have also refused to bind nonparties to the provisions of consent decrees, both in the context of appellate review of attempts to intervene in consent decree litigation and in the context of decisions to allow collateral litigation to go forward.[20]

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[20]*See United States v. Automobile Manufacturers Association, Inc.*, 307 F.Supp. 617 (C.D.Cal. 1969), *aff'd*, 397 U.S. 248 (intervention to block entry of a consent decree should be denied because proposed intervenors remained free to pursue their independent claims); *United States v. City of Jackson*, 519 F.2d 1147 (5th Cir. 1975) (Rule 24 intervention denied because courts should accord "little or no weight in the determination of the rights of persons not [a] party" to discrimination decrees); *Harmon v. San Diego County*, 477 F.Supp. 1084 (S.D.Cal. 1979) (nonminority held not bound by terms of a Title VII consent decree where he was not given notice and an opportunity to participate); *McAleer v. American Tel. & Tel. Co.*, 416 F.Supp. 435, 440 (D.D.C. 1976) (Gesell, J.) (consent decree made necessary by employer's discrimination is no defense to the claim of a faultless employee); *National Wildlife Federation v. Gorsuch*, 744 F.2d 963 (3rd Cir. 1984) (consent judgment does not bind a nonparty; nonparties have no duty to intervene); *Reeves v. Wilkes*, 754 F.2d 965, 971 (11th Cir. 1985) (intervention by whites, without notice of decrees, inappropriate; whites cannot intervene to challenge the decree because separate suit is the appropriate route; "By definition, a consent decree only binds those who consent, either expressly or impliedly"); *County of Orange v. Air California*, 799 F.2d 535 (9th Cir. 1986) (intervention to contest consent decree denied as untimely; however, denial of intervention does not preclude nonparty from taking other action; consent decree is a "negotiated settlement affecting only the signing parties"); *United States v. Allegheny-Ludlum Industries*, 517 F.2d 826, 845-46 n.21 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); *Madison Square Garden Boxing, Inc. v. Shavers*, 562 F.2d 141, 143 (2d Cir. 1977) (consent judgment binds only consenting parties). *See also Samayoa by Samayoa v. Chicago Bd. of Education*, 807 F.2d 643 (7th

In this case, none of the traditional rules for precluding challenges by nonparties to consent decrees are applicable.[21] As previously stated, both the district court and the Eleventh Circuit held that neither respondents, nor their privies, are parties to the decrees. Pet. App. 12a-13a, 105a. While a nonparty might be bound if an existing party adequately represents its interests, *Montana v. United States*, 440 U.S. 147 (1979), the Eleventh Circuit has twice held that no party to the consent decree litigation adequately represented the interests of respondents. In the first appeal, the Eleventh Circuit stated that the "BFA members had no identity of interest with the City . . . From the beginning, the Board and City represented a wide range of occupations in the public sector and had different cost-benefit settlement interests, and incentives, from those of the BFA members." J.A. 155. The appeals court again stated in the decision below:

> [T]he record fails to indicate that the City mounted a vigorous defense to the allegations leveled against it before entering into settlement negotiations. Indeed, the district court never tried the independent claims against the City. Consequently, it is far from clear that the City in any way adequately represented the individual plaintiffs' interest in the events leading up to the entry of the decrees. Moreover, it is not clear that the plaintiffs and the City shared any identity of interest at all. The City's various interests in this dispute conceivably may have conflicted in part with the plaintiffs' single interest in preserving preexisting promotion opportunities. Indeed, the City's interests were antagonistic in that it had every reason to avoid a determination of liability and little reason to object to the promotional aspects of the settlement. The settlement did not require the City to make any additional promotions, but only to

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Cir. 1986) (Easterbrook J., joined by Posner and Coffey, J.J., dissenting from denial of rehearing *en banc*) (consent decrees resolving discrimination claims do not bind strangers and may be challenged).

[21] This case does not involve a special remedial scheme that expressly forecloses successive actions by nonparties. A legislative body may develop an appropriate procedural device which will allow courts and parties, consistent with the due process clause, to achieve finality in litigation. Bankruptcy, reorganization, and probate statutes provide such appropriate remedial schemes. This is not such a case.

> reallocate the promotions that it would have made in any event. In real terms, the relief contemplated by the decrees was to come not from the hands of the City, but from the hands of the employees who would have otherwise received the promotions. At the very least, the City was in the position of a disinterested stakeholder with respect to the contested promotions. Given the disparate interests of the City and the individual plaintiffs, it is clear that the City could not have served as an effective surrogate for the individual plaintiffs' interests when it negotiated the plan incorporated into the consent decrees. Accordingly, it would be impossible to conclude that these plaintiffs are in any way bound by those decrees.

Pet. App. 16a. Given the disparate interests of the employees and the parties to the consent decrees, the finding of the lower court that respondents cannot be bound as parties to the decrees is due to be upheld. *See also, Arizona v. California*, 460 U.S. 605, 650 (1983) (Brennan, J., joined by Blackmun and Stevens, J.J., dissenting) (nonparties not sufficiently represented by existing parties are not estopped).

B. There Is No Basis For A Theory Of Mandatory Intervention.

Petitioners seek to create a rule placing the burden of intervention on nonparties in litigation which may result in a consent decree adversely affecting their rights. Under petitioners' theory, if intervention is not sought in a "timely" manner, nonparties are precluded and effectively bound by any settlement decree entered in the litigation. This theory is flawed.

In *Chase National Bank v. City of Norwalk*, 291 U.S. 431 (1933), this Court held that "[t]he law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger. . . . Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights." *Id.* at 441. *See also National Licorice Co. v. N.L.R.B.*, 309 U.S. 350, 366-367 (1940); Comment, *Collateral Attacks On Employment Discrimi-*

nation Consent Decrees, 53 Chi.L.Rev. 147, 157 (1986) (mandatory intervention rejected in *Chase National Bank*). Given the undisputed fact that respondents are entitled to a hearing, they therefore had no duty to intervene.

Petitioners rely upon *Penn Central Merger and N & W Inclusion Cases,* 389 U.S. 486 (1968), to support their claim that respondents had an affirmative duty to intervene in the consent decree proceedings and that respondents should be forever precluded from contesting any action allegedly taken pursuant to the settlement embodied in the consent decree. Petitioners' reliance upon *Penn Central* is misplaced for several reasons.

First, the *Penn Central* litigation arose out of a unique program of massive congressionally-mandated reorganization of an uneconomical national railway system. *Id.* at 492-494. Congress, faced with the prospect of objection to reorganization by competing interests, provided a statutory framework to resolve potential challenges to the plan of reorganization through hearings by the Interstate Commerce Commission (I.C.C.), and limited judicial review of I.C.C. orders. The relevant statutes have since been repealed. *See* Transportation Act of 1940, 5 Stat. 898; 49 U.S.C. § 5. The potential scope of litigation seeking review of I.C.C. orders was so great that Congress saw fit to provide that "orders, writs, and process of the district courts may . . . run, be served and be returnable anywhere in the United States." 28 U.S.C. § 2231. Hence, in *Penn Central*, where suit had been brought before a three judge federal district court sitting in New York, the process of the court in that case ran throughout the nation. *Penn Central*, 389 U.S. at 505 n.4. Narrow judicial review of the proceedings before the I.C.C. was further effected by a waiver of possible objections upon grounds of improper venue by the United States. *Id.* Proceedings in other district courts were stayed, but not dismissed, in order to prevent a multiplicity of litigation regarding the I.C.C.'s merger and inclusion decision.

Second, the claims of all interested parties in *Penn Central* were considered *on the merits* by the Supreme Court. Various Pennsylvania interests objected to the merger order. The

City of Scranton and Milton J. Shapp filed complaints in the New York proceeding. *Id.* at 502. The Borough of Moosic filed suit in the Middle District of Pennsylvania. Scranton and Shapp then intervened in the Moosic action, which was stayed by the district court pending resolution of the New York cases. *Id.* at 503. After Scranton and Shapp failed to prosecute their New York complaints, despite warnings from the court, their claims were dismissed. *Id.* at 502. The New York court added that the claims were substantively of "no merit." *Id.* at 504-505. This Court held that Moosic's petition for mandamus was moot because the stay of the Pennsylvania proceeding had been dissolved. *Id.* at 503. The Court upheld the dismissal of Scranton and Shapp's New York complaint both on procedural grounds and "the lack of merit of their claims." *Id.* at 505.

In discussing further proceedings in the Pennsylvania case, the *Penn Central* Court refused to preclude further proceedings, finding that "Scranton, Shapp and Moosic may of course, seek such relief, if any, in that Court as may be available and appropriate in light of our decision herein." *Id.* at 506. The Court noted that, as parties to the New York case, Scranton and Shapp were precluded from relitigating the merits of the merger order. *Id.* at 505. Moosic was also deemed bound. Although it refused to join the New York case, its claims were identical to those of Scranton and Shapp, and those same claims had been litigated to a conclusion by Scranton and Shapp before both the New York court and this Court. *Id.* at 504-506. Implicit in the Court's decision is a finding that Moosic's interests were effectively represented by Scranton and Shapp in the New York court and that there was no need to duplicate the earlier proceedings in the district court and in appellate proceedings. This Court has held, of course, that a nonparty may be collaterally estopped when an existing party acts as the effective surrogate or privy of the nonparty. *See Montana v. United States,* 440 U.S. 147 (1979), and discussion at Part IA, *supra.* Clearly, Moosic's interests were identical to, represented by, and fully litigated before this Court by Scranton and Shapp.

Third, the scope of judicial review in *Penn Central* was

necessarily very limited. The three judge New York district court was not at liberty to reopen the proceedings of the I.C.C. Rather, judicial review was confined to a determination of whether the action taken by the I.C.C. could be supported by substantial evidence. Accordingly, Moosic could never be entitled to more than a cursory review of the merits of the I.C.C. merger order. The most Moosic could have hoped for would have been a determination of whether the I.C.C. had issued the merger and inclusion orders in the *Penn Central* case upon adequate evidence. As discussed above, both the New York district court and the Supreme Court found the objections to the merger to be without merit. *Penn Central,* 389 U.S. at 504-505.

Finally, litigation seeking judicial review of an I.C.C. order of the kind found in *Penn Central* is fundamentally unlike litigation by third parties seeking to challenge voluntary action taken pursuant to a consent decree. While Moosic's claims were litigated by parties with identical interests, the agreement challenged here stems from the voluntary action of parties with interests in conflict with those of respondents rather than the considered judgment of a court.[22]

Since the *Penn Central* and *Provident* decisions in 1968, this Court has emphasized that personal jurisdiction must be found to attach in order to bind a nonparty. During the following term, in *Zenith Radio Corp. v. Hazeltine Research,* 395 U.S. 100 (1969), the *Hansberry* principle was reaffirmed that "[i]t is elementary that one is not bound by a judgment in personam resulting from litigation to which he is not desig-

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[22]The reliance of petitioners' and their *amici* upon *Provident Bank & Trust Co. v. Patterson,* 390 U.S. 102 (1968) is without merit. There, this Court expressly declined to decide whether a nonparty could choose to relitigate in state court issues decided in a diversity action to which he was not a party. "We do not now decide whether such an argument would be correct under the circumstances of this case." *Id.* at 114. Similarly, reliance by the City on *Arizona v. California,* 460 U.S. 605 (1983) is erroneous. *Arizona* was an original jurisdiction case wherein this Court refused to reopen past decisions relying upon the doctrines of *res judicata* and collateral estoppel. The Court held the Indian Tribes were bound by its earlier findings because the United States had fully represented their interests. *Id.* at 626-627; *see also, id.* 650-652 (Brennan, J., dissenting).

nated as a party to which he has not been made a party by service of process. . . . " *Zenith Radio,* at 110.

Given the unique circumstances in *Penn Central,* it is clear that this Court has never accepted the principle of mandatory intervention.

C. Even If There Is A Duty To Intervene, Due Process Requires Adequate Notice And A Hearing.

Respondents never received adequate formal or actual notice of the pendency of the settlement. They received no invitation to intervene, and no appellate court has yet ruled upon the merits of either the facial validity of the decrees or the conduct of the City and Board in denying promotions to the respondents.

Petitioners' assertion that respondents should never be allowed to bring their claims before any court presents a uniquely unfair situation in the factual context of this case. The BFA and two firefighters sought to intervene *prior* to approval of the consent decrees. Petitioners successfully opposed intervention by would be objectors on grounds of timeliness and standing. Petitioners now paradoxically claim that respondents intentionally bypassed an opportunity to intervene and are thereby estopped. City Br. at 36-37. *See also* Cooper, *The Collateral Attack Doctrine and the Rules of Intervention: A Judicial Pincer Movement on Due Process,* 1987 Legal Forum 155 (1987). Respondents contend, however, that they have diligently sought to assert their rights at every opportunity.

1. *Adequate Notice Was Not Given.*

Though repondents are of the opinion that the parties to the consent decrees in this case were under a mandatory duty to join those nonparties whom they sought to bind by their proposed decree, see Part IV, *infra,* respondents submit that if intervention is required, then nonparties should, at a minimum, receive formal notice. The practical effect of the doctrine of mandatory intervention proposed by petitioners is that parties to a consent decree may obtain a consent

judgment from a court and make that judgment binding against all third parties. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950) requires that in such circumstances, parties are entitled to the "best notice practicable." If a person's identity and whereabouts are known, the party seeking to bind another must mail or personally serve specific notice of the action. *Mullane*, 317-318.

In *Mullane*, this Court struck down a state statute permitting notice by publication to known beneficiaries in a proceeding for judicial settlement of trust accounts despite the fact that the trustee knew their identities and addresses. It made no difference that Mullane received actual notice of the proceeding and represented the interests of known beneficiaries. This Court held, at a minimum, individual notice by mail was required to be given to known interested parties. *Mullane*, 318-320.

Last term in *Tulsa Professional Collection Services v. Pope*, 108 S.Ct. 1340 (1988), this Court again upheld the duty to give adequate notice by mail to known interested parties. The *Tulsa* Court struck down an Oklahoma statute permitting notice by publication to known creditors in a state probate proceeding. The Oklahoma statute permitted notice by publication for 2 consecutive weeks in a local newspaper. The publication commenced after the state probate court opened the estate upon request of the executor or administrator of the estate. This Court found that when private parties trigger a state statute of limitations through commencement of judicial proceedings there is sufficient state action to implicate the Due Process Clause. In such circumstances, "due process is directly implicated and actual notice generally is required." 99 L.Ed.2d at 577. The party giving such actual notice bears the burden of "reasonably diligent efforts . . . to uncover the identities . . . " of those interested parties that are "reasonably ascertainable. . . . " *Id.* at 578. This Court held that if the interested nonparties "identity was known or 'reasonably ascertainable,' then termination of appellant's claim without actual notice violated due process." *Id.* at 579.

The notice must be sufficient to apprise nonparties of the nature of the decree-approval proceedings, the effect of failure to seek intervention, and the time limit for motions to intervene. Comment, *Collateral Attacks On Employment Discrimination Consent Decrees*, 53 Chi.L.Rev. 147, 160-161 (1986). Adequate notice must apprise the potentially affected nonparty of the procedure for resolving claims at a hearing so as to permit the objector to adequately prepare for the hearing. *Memphis Light, Water and Gas Division v. Craft*, 436 U.S. 1, 13-15 (1978).

No effort was made to give adequate formal notice in this case and it is without dispute that actual notice was not given.[23] The published statement made no mention of the goals and quotas for BFRS promotional positions, did not describe the nature of the proceedings at the fairness hearing, failed to advise the nonparties that they could seek to intervene or when they would be barred from doing so, and deceptively stated that the decree was designed to merely ensure "equal employment opportunities." Pet. App. 171a-174a. The loss that the employees who were denied promotions were to suffer is not made clear by the alleged "notice". More importantly, it is undisputed that all of the respondents were incumbent city employees during the decree-approval proceedings, and no notice was given by either hand delivery, mail or posting at the job site. The notice provisions of the decree made clear that only the black employees received actual notice. Pet. App. 141a-146a. To the extent that the consent decrees were to foreclose the claims of the City's nonminority employees, they were entitled to the same notice as that provided to the City's black employees.

In similar fashion to the notices by publication in *Mullane* and *Tulsa*, the published statement in this case was triggered by judicial action in the form of the district court's June 8,

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[23]The theory of notice was not raised in the petitioners' appellee briefs in the Eleventh Circuit. Rather, petitioners only claimed that an adequate *hearing* was given in the form of the Fairness Hearing. *See*, Brief for Richard Arrington, Jr. and the City of Birmingham, at 26 (11th Cir.); Brief for Appellees-Cross Appellants John W. Martin, *et al.*, at 2, 23 (11th Cir.). As discussed in the text, the formal published statement was inadequate and there is no evidence in the record of actual notice to the respondents.

1981 order provisionally approving the consent decrees. The City argues that respondents should have realized that their interests would potentially be affected by the proposed decrees and that therefore they should have intervened in the consent decree proceedings. By the same token, however, the Board and City, equipped with the numerous lawyers who had negotiated the decrees, through reasonable diligence should have equally realized that the City's existing nonminority employees would be affected by the decrees and ascertained their identities and addresses through the City's payroll records. Hence, respondents should have received the best possible notice in person or by mail. Indeed, the *Mullane* and *Tulsa* decisions require notice by mail to known and interested persons — regardless of whether those persons are aware of the proceedings.

In addition to petitioners' use of a defective mode of providing notice, the parties to the consent decrees crafted a deceptively vague notice. The notice mailed to each black employee included a copy of the entire consent decree together with a detailed summary of the specific goals and quotas to be entered for the various job classifications in the City employment structure including the fact that interim annual and long-term goals for the position of Fire Lieutenant were to be included in the decree. Pet. App. 186a. The published notice merely advised "interested persons" that the City had entered into a decree which included unspecified "goals" designed to "correct for the effect of any alleged past discrimination and to ensure equal employment opportunities for all . . . " Pet. App. 174a. If the parties to the decree realized that the nonminority employees were "interested persons," and they could hardly fail to do so, then they could and should have provided a notice to respondents similar in detail to that provided to the black employees.

The published statement failed adequately to inform respondents of the required steps necessary to properly protect their rights. The notice simply stated that the district court would hear objections on August 3, 1981 at the federal courthouse. Notice was not given that in order to fully protect their right of participation, respondents would have

to retain counsel, move to intervene by a certain time, and take action other than simple lodging of objections or they would be forever barred.

The parties to the decrees should have recognized their duty to provide the best notice practicable to each respondent. Such notice should have been mailed to each respondent as all were city employees at the time, and the City was aware of their identities and addresses.[24] *See Armstrong v. Marizo,* 380 U.S. 545, 550 (1965) (failure to give a known interested party individual notice of judicial "proceeding violated the most rudimentary demands of due process"; the opportunity to object "must be granted at a meaningful time and in a meaningful manner"); *Boddie v. Connecticut,* 401 U.S. 371, 377-378 (1971); *Grannis v. Ordean,* 234 U.S. 385, 395 (1913) (fundamental requisite of due process of law is the opportunity to be heard).

2. *No Adequate Hearing Was Provided.*

Petitioners cannot avoid the requirement of notice in this case by claiming that respondents received an adequate opportunity to be heard at the fairness hearing. A fairness hearing does not provide nonparty objectors with an adequate opportunity to be heard. *See,* Comment, Collateral Attacks on Employment Discrimination Consent Decrees, 53 Chi.L.Rev. 147, 181 n.139 (1986) (use of a fairness hearing to dispose of nonminority claims is the most extreme view). The fairness hearing held in this case by the district court did not provide objecting parties with the benefits normally accorded to parties in litigation. Thus, the objectors were not able to engage in discovery, could not call witnesses or offer evidence, and, most importantly, could not appeal from the proceedings of the district court. Indeed, despite over seven years of continuous litigation, no appellate court has ever

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[24] As in *Tulsa,* there is no evidence in the record that the individual respondents received *actual* notice of the decree approval proceedings. The decrees made no provision for individual notice to nonminority employees. Nor is there any evidence that the individual respondents were aware of the pendency of the lawsuit. In fact, not all respondents had been hired at the time the suits were filed in 1974 and 1975. J.A. 382.

addressed the validity of Birmingham's plan, either on its face or as it applies to the respondents.

Respondents suggest that the fairness hearing process, whereby nonparties are given the opportunity to voice their concerns through objections, does not rise to the level of the full hearing necessary to terminate the substantive rights of nonparties. Rather, the fairness hearing is much like the predeprivation conference in *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985) where the charged employee is given the right to appear before the decisionmaker to coax, object and respond to the proposed deprivation, but not call witnesses or cross-examine those of the employer. Indeed, *Loudermill* provided that *after* a deprivation the employee is entitled to a full hearing. Employees who are denied a promotion on the basis of race are certainly entitled to no less. Respondents' suits are akin to the full post deprivation hearing required by *Loudermill*.

3. *Intervention Was Sought By Nonminorities And Denied.*

As stated above, the published statement did not apprise interested parties of the period of time within which intervention would be allowed or required. In any event, requiring intervention within 43 days of the publication of notice, as in this case,[25] is an unconstitutionally short period of time within which to require interested parties to intervene.

The *Martin* petitioners claim that intervention would have been timely and appropriate had it been sought before the fairness hearing.[26] While they never have demonstrated any prejudice by the one day delay, a requirement of intervention within a narrow window of some 43 days is clearly contrary to minimum standards of due process, particularly when the limitations period is triggered by an unknown

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[25]The publication was completed on June 21, 1981. J.A. 697. The fairness hearing was held 43 days later on August 3, 1981. J.A. 727.

[26]*See*, Martin Petitioners' Reply Brief In Support Of Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit, 5 n.3. This position is quite different from that advanced by the Martin petitioners in the first appeal. They argued there that the proposed intervenors were seven years too late and lacked any litigable interest to

judicial action rather than actual injury to the party entitled to receive notice. *See Tulsa Professional Collection Services v. Pope*, 108 S.Ct. 1340 (1988). A motion to intervene was made on the forty-fourth day following publication of the "notice" and seventeen days *before* final approval of the decrees. Given the lack of any announced procedure for evaluating timeliness, the attempt to intervene was clearly permissible if movants were to be deemed bound by the decrees.

The City claims intervention during the approval proceedings would still have been untimely. The City advocates imposing a burden on nonparties to intervene as soon as they learn of the *pendency* of discrimination litigation involving their employer. City Br. at 22, 36. Petitioners must concede that no notice was given to the employees of the pendency of the action and there is no evidence that the individual respondents were aware of the pendency of the *Jefferson County* litigation. The City's own Fire Chief did not even know that the litigation might involve BFRS promotions. J.A. 452. As demonstrated in Part IV, *infra*, placing a burden on respondents to intervene shortly after the cases were filed is clearly unreasonable.

D. Federal Courts Lack the Power to Alter Substantive Rights Through the Collateral Attack Bar.

The collateral attack bar alters the period of time established by Congress for the assertion of discrimination claims. In Alabama, Title VII charges of discrimination must be filed with the Equal Employment Opportunity Commission within 180 days of the act of discrimination. 42 U.S.C. § 2000e-(5)(e), (f). The statute of limitations for a claim

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permit intervention. *See*, Brief of John W. Martin, *et al.*, *United States v. Jefferson County*, No. 81-7761 (11th Cir.); *see also* J.A. 180. The City petitioners continue to maintain that respondents should have sought intervention when *Jefferson County* was filed, some seven years earlier, and that the intervenors lacked standing to intervene. J.A. 535-536. Although we think both arguments are erroneous, the difference illustrates the guesswork attendant to the determination of the appropriate time for intervention.

under the Fourteenth Amendment is governed by 42 U.S.C. § 1988. The petitioners' position that the only time respondents could have asserted their claims is governed by the timeliness requirements of Rule 24 is thus tantamount to a judicial modification of the statute of limitations. In addition, to require the assertion of discrimination claims prior to their accrual is an alteration of the statutory provision that the limitations period commences when "the alleged unlawful employment practice occurred." 42 U.S.C. § 2000-e(5)(e). *See also Delaware State College v. Ricks,* 449 U.S. 250 (1980).

It is quite clear, however, that courts lack the authority to revise these substantive rights. Congress has required that the Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive rights . . . " 28 U.S.C. § 2072. By reducing the statute of limitations for assertion of discrimination claims through requiring "timely" Rule 24 intervention, courts alter substantive rights of nonparties. *See* Kramer, *Consent Decrees and the Rights of Third Parties,* 87 Mich.L.Rev. ___ (Nov. 1988); *see also* Comment, *Collateral Attacks On Employment Discrimination Consent Decrees,* 53 Chi.L.Rev. 147, 164 (1986) (federal courts lack the power to develop a system of mandatory intervention). Although we think there is no warrant for this alteration, the judgment whether there is must be made by Congress. It depends on facts not readily available to the courts, such as the cost to third parties from foreclosing claims due to the shortened period of intervention and the benefits to parties and the courts in terms of settlement. More importantly, it calls for a value judgment with respect to competing interests — the substantive rights of third parties versus the procedural benefits to parties.

Beyond that, a court rule that requires assertion of claims before they mature is clearly an improper alteration of respondents' substantive rights and contrary to the notion that "the limitation periods should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes." *Delaware State College v. Ricks,* 449 U.S. 250, 262 n.16 (1980). It is submitted, therefore, that since the respondents filed suit within the limita-

tion period prescribed by Congress, their claims are due to be heard.

II. RESPONDENTS' SUITS ARE CONSISTENT WITH THE POLICIES OF TITLE VII AND THE CONSTITUTION.

Given the voluntary nature of a consent decree, the strong public policy of Title VII and the Constitution that individual rights cannot be waived by others, and the policy favoring the policing of all race-based conduct, there is no justification for giving the Birmingham consent decrees any more preclusive effect against third parties than one would give a voluntary affirmative action plan.

A. Consent Decrees Are Voluntary Devices Entitled To No More Preclusive Effect Than Unilaterally Adopted Affirmative Action Plans.

Petitioners' claim that the Eleventh Circuit's rule permitting nonparties to litigate the validity of conduct taken pursuant to a decree will signal the death knell for consent decrees and voluntary efforts to remedy past employment discrimination. On the contrary, nothing will prohibit an employer from voluntary efforts to remedy past discrimination in a *lawful* manner. Employers will continue to be free to adopt lawful affirmative action plans and embody those plans in a consent decree where appropriate. In addition, embodying their settlement in a consent decree is advantageous for a number of other reasons — mostly relating to enforcement of the decree as between signing parties. *See*, Part III, *infra*. Accordingly, since these benefits remain even without the collateral attack bar, petitioners are wrong to assert that consent decrees will suddenly become useless.

To treat a consent decree in the same manner as any other voluntary plan is consistent with this Court's recognition of the wider latitude afforded parties in crafting consent decrees over that allowed courts in ordering a remedy in a litigated proceeding. *Local No. 93 v. City of Cleveland*, 478 U.S. 501, 92 L.Ed.2d 405 (1986) (Court rejected union's claim

that a district court lacked the authority to enter a consent decree providing relief broader than that which the court might require under § 706(g)). *See also,* Mengler, *Consent Decree Paradigms: Models Without Meaning,* 29 Boston Col.L.Rev. 291 (1988). In the employment discrimination context, as in the antitrust field, "the voluntary nature of a consent decree is its most fundamental characteristic." *Local No. 93, supra,* 92 L.Ed.2d at 423. *See, United States v. ITT Continental Baking Co.,* 420 U.S. 223, 235-237 (1975); *United States v. Armour & Co.,* 402 U.S. 673 (1971); *Hughes v. United States,* 342 U.S. 353 (1952); *United States v. Atlantic Refining Co.,* 360 U.S. 19 (1959). "Most importantly, it is the agreement of the parties, rather than the force of the law upon which the complaint was based, that creates the obligations embodied in a consent decree." *Local No. 93,* 92 L.Ed.2d at 423-424. "[T]he parties' consent animates the legal force of a consent decree." *Id.* at 425.

Since consent decrees, while bearing the form of judgments, are essentially voluntary contractual devices, this Court should not clothe consent decree parties with whatever immunity may flow from a court-imposed judgment entered after a finding of liability. "[T]he fact that the parties have consented to the relief contained in a decree does not render their action immune from attack on the ground that it violates § 703 of Title VII or the Fourteenth Amendment." *Local No. 93,* 92 L.Ed.2d at 426. Just as consent decrees are not the sort of "orders" subject to the limitations of § 706(g), they are not the sort of orders of a court that might be entitled to preclusive effect.

Given these voluntary attributes of a consent decree, this Court held in *Local No. 93* that "parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and a fortiori may not impose duties or obligations on a third party, without that party's agreement. A Court's approval of a consent decree between some of the parties, therefore, cannot dispose of the valid claims of nonconsenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor." 92 L.Ed.2d at 428. While *Local No. 93* arose in the context of intervention

by a union, it makes little sense to have a different rule foreclosing unconsenting nonparties from raising their individual claims through timely lawsuits heard by the same court and judge having jurisdiction over the consent decrees. The same analysis that led the Court to conclude that a consent decree could not alter or modify the *substantive* rights of third parties, supports the conclusion that it cannot alter their *procedural* rights. Indeed, Justice O'Connor emphasized this point by stating that "nonminority employees . . . remain free to challenge the race-conscious measures contemplated by a proposed consent decree as violative of their rights under § 703 or the Fourteenth Amendment." *Id.* at 429 (O'Connor, J., concurring). *See also Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 589 n.4 (1984) (O'Connor, J., concurring) ("The policy favoring voluntary settlement does not, of course, countenance unlawful discrimination against existing employees. . . . ").

B. The Collateral Attack Bar Improperly Encourages Employers To Shift The Costs Of Their Alleged Illegal Conduct To Innocent Employees.

Title VII and the Constitution both embody strong policies recognizing an individual's right to not be treated differently on the basis of race. Since that right cannot be prospectively waived by others, it makes little sense to hold that a voluntary consent decree precludes third party discrimination claims before they even accrue. To be sure, the Court has treated discrimination claims by nonminority plaintiffs differently than minority claims. *See Steelworkers v. Weber*, 443 U.S. 194 (1979); *Regents v. Bakke*, 438 U.S. 265 (1978). However, within the contours of the law as thus defined, nonminority plaintiffs are entitled to the same opportunity to protect themselves as minority plaintiffs. Their right to be free from what this Court has recognized as unlawful discrimination is no less important. Yet, the collateral attack bar encourages employers to waive the rights of their nonminority employees by shifting the costs of alleged past discrimination to them through affirmative action. Hence, it makes it more difficut for third parties to prove that the affirmative action

agreed to in negotiations to which the third parties were not invited goes too far and violates their rights. This is inconsistent with recent refusals by this Court to bind nonparties to the terms of voluntary affirmative action efforts which have become the subject of court orders. *W. R. Grace & Co. v. Local 759, Rubber Workers*, 461 U.S. 757 (1983) (Title VII); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) (Constitution).

In *Grace, supra*, the employer negotiated a conciliation agreement with the E.E.O.C. designed to remedy past discriminatory practices. The union representing the employees was invited by the Commission to participate in the negotiations, but declined to do so. *Id.* at 759. The employer and the E.E.O.C. signed a conciliation agreement dated December 11, 1974 and thereafter laid off more senior males pursuant to the provisions of the conciliation agreement but contrary to the contractual rights of the employees. *Id.* at 760-761. The union's first suit was unsuccessful in the district court, which ordered the agreement enforced, and the layoffs took place. *Id.* at 761. Two years later the district court's decision was reversed by the Fifth Circuit Court of Appeals. *Id.* at 762. The males were reinstated to their jobs and filed grievance claims for backpay which were granted following arbitration. *Id.* at 762-764. The employer filed a second suit claiming it should not be liable for backpay because it complied in good faith with the conciliation agreement and injunction.

This Court rejected the employer's claims, noting that by voluntarily entering into the conciliation agreement with the E.E.O.C. without the consent of the union the employer was "cornered by its own actions," and was in a "dilemma . . . of [its] own making," *id.* at 767, 770. Thus, the Court held the employer could not avoid liability to its innocent employees despite the fact that its conduct was mandated by the conciliation agreement and a district court injunction ordering compliance with the conciliation agreement. This Court considered and rejected the arguments petitioners now make here that the duty to obey injunctions justified such conduct and required that the employer bear the

economic burden for its past discriminatory conduct:

> Obeying injunctions often is a costly affair. Because of the Company's alleged prior discrimination against women, some readjustments and consequent losses were bound to occur. The issue is whether the Company or the Union members should bear the burden of those losses . . . By entering into the conflicting conciliation agreement, by seeking a court order to excuse it from performing the collective-bargaining agreement, and by subsequently acting on its mistaken interpretation of its contractual obligations, the Company attempted to shift the loss to its male employees, who shared no responsibility for the sex discrimination. The Company voluntarily assumed its obligations under the collective-bargaining agreement and the arbitrator's interpretations of it. No public policy is violated by holding the Company to those obligations, which bar the Company's attempted reallocation of the burden.

Id. at 770. Similarly, the Court rejected the argument that the policy in favor of voluntary compliance justifies the employer's abrogation of the contract rights of unconsenting employees. *Id.* at 771. While no formal collective-bargaining agreement is implicated in this case, respondents have enforceable contractual rights under the state civil service statutes,[27] as well as rights under Title VII and the Fourteenth Amendment. *See, McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976). Respondents' individual Equal Protection and Title VII rights are just as important as the enforcement of a private sector collective-bargaining agreement. Given the Court's holding that the union must be able to enforce its contractual rights, despite its knowing

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[27]Respondents have enforceable rights under the state merit system statute to promotions based on test scores and seniority points without regard for race, which have been unilaterally abrogated by the defendants. J.A. 434, PX 1, R1-27. The state courts have determined that these rights are akin to enforceable contract rights. *See, City of Birmingham v. Lee*, 254 Ala. 237, 48 So.2d 47 (1950); *Ex parte Bracken*, 262 Ala. 402, 82 So.2d 629 (1955); *Anderson v. Mullins*, 281 Ala. 609, 206 So.2d 856 (1967); and *City of Birmingham v. Walker*, 267 Ala. 150, 101 So.2d 250 (1958) ("laws governing the City [of Birmingham] and its employees constitute the contract of the City with [the employees]"). Respondents included state law claims in their complaints. Pet. App. 110a-116a; J.A. 93-99, 130-134.

rejection of the invitation to join the E.E.O.C. mediation process, respondents in this case should not be precluded when every effort to intervene was met with opposition from the consent decree parties.

In *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), this Court considered the validity of a "remedial" layoff plan despite the fact that the plan was part of a union contract and the public employer had been ordered by a court to comply with the plan. *Id.* at 270-272. The *Wygant* petitioners filed suit claiming their Constitutional rights had been violated by race-based layoffs mandated by a collective-bargaining agreement which had been ordered to be enforced in earlier litigation. The plurality rejected the notion that Wygant was bound by her union's contract:

> Of course, when a State implements a race-based plan that requires such a sharing of the burden, it cannot justify the discriminatory effect on some individuals because other individuals had approved the plan. Any "waiver" of the right not to be dealt with by the government on the basis of one's race must be made by those affected. . . . The Constitution does not allocate constitutional rights to be distributed like bloc grants within discrete racial groups; and until it does, petitioners' more senior union colleagues cannot vote away petitioners' rights.

Id. at 281, n.8. *See also, id.* at 318 (Stevens, J., dissenting) (noting the "procedural inadequacy" of set aside in *Fullilove* and comparing it to *Wygant*).

The lesson of *Wygant* and *Grace* is consistent with underlying policy of Title VII and the Constitution that each person has an individual right to freedom from discriminatory practices which cannot be prospectively waived by third parties. This is all the more true in view of *Local No. 93*'s rules based on the voluntary nature of a consent decree and the limited rights of unconsenting third parties to block entry of a consent decree. While *Alexander v. Gardner-Denver Co.*, 415 U.S 36 (1974), recognized the policy of Title VII to encourage voluntary settlement of claims before the E.E.O.C., this Court also recognized that "there can be no prospective waiver of an employee's rights under Title VII. . . . Title

VII's strictures are absolute and represent a congressional concern that each employee be free from discriminatory practices." *Id.* at 51. *See also, Connecticut v. Teal*, 457 U.S. 440, 453 (1982) ("Section 703(a)(2) prohibits practices that would deprive or tend to deprive '*any individual* of employment opportunities.' "); and *E.E.O.C. v. Safeway Stores*, 714 F.2d 567 (5th Cir. 1983).

In view of these policies against waiver by others of the right to be free from discrimination and the impropriety of shifting the cost for illegal conduct to innocent third parties, there is no justification for providing a voluntary consent decree with any more preclusive effect than that given a voluntary affirmative action plan.

C. The Collateral Attack Bar Hinders The Policing Of Affirmative Action Plans.

Petitioners seek to invoke the collateral attack bar to insulate themselves from all claims contesting conduct allegedly taken pursuant to an approved consent decree. By refusing to hear the claims of nonparties challenging the lawfulness of decree-related conduct, the courts are avoiding the duty to carefully police remedial race-based conduct.

The adoption of an allegedly valid plan is only the first step in the remedial process. The plan must be implemented carefully. Facial validity does not ensure against conduct that, although within the letter of the plan, may be outside the permissible boundries of valid affirmative action. *See Fullilove v. Klutznik*, 448 U.S. 448, 480-482 (1980) (adoption of a prospective remedial plan that "functions in the manner of an injunctive decree" does not foreclose later challenges to "specific applications of the program" as unconstitutional); and *South Florida Chapter of the Associated General Contractors v. Metropolitan Dade County, Florida*, 723 F.2d 846 (11th Cir.), *cert. denied*, 469 U.S. 871 (1984) (cautioning against conclusory use of race in implementation of a facially valid plan).

The policy favoring judicial policing of plans is especially important in a case such as the present where, given the manner in which the City decree was implemented, the provisions of the decree designed to protect against tram-

melling were deemed "illusory at best" by the Eleventh Circuit. Pet. App. 19a.

Through the collateral attack bar, petitioners seek to isolate themselves from accountability after approval of a consent decree. The consent decrees at issue here are merely a defense to respondents' discrimination claims. Pet. App. 82a-83a; J.A. 130-137. The real issue is the discriminatory *conduct* of the employer. By refusing to hear respondents' claims, the petitioners are no longer accountable for their conduct.[28]

III. RESPONDENTS' SUITS WILL NOT UNDERMINE THE ACCEPTED GOALS WHICH CONSENT DECREES SEEK TO FURTHER.

The *Local No. 93* Court opined that consent decrees provide litigants with several benefits through built in judicial enforcement mechanisms which private contracts lack:

- A consent decree is often a complicated document designed to be carried out over a period of years with the benefit of continuing oversight and interpretation by the court.
- Enforcement by decree parties is easier because it will be unnecessary to prove facts that have been previously established and a court has "a more flexible repertoire of enforcement measures" than private parties.
- " '[I]t is . . . easier to channel litigation concerning the validity and implications of a consent decree into a single forum — the court that entered the decree — thus avoiding the waste of resources and the risk of inconsistent or conflicting obligations."

92 L.Ed.2d at 424, n.13, *quoting* Brief for National League of Cities, *et al.* as *Amicus Curiae*, 25. *See also,* Kramer, *supra*; Mengler, *Consent Decree Paradigms: Models Without Meaning,* 29 Boston Col.L.Rev. 291, 327-336 (1988). To permit re-

[28]It is no answer to claim that the district court or the United States is the guardian against abuse of decree-embodied affirmative action plans. As demonstrated by this case, a district court is inclined to protect the decree it previously entered and the United States, as a party to the decree, has different interests than those of nonparties.

spondents' claims to be heard on the merits will not undermine any of these goals. Moreover, the district court's consolidation of these suits is consistent with the common notion of the foregoing points that all litigation concerning consent decrees is best channeled to the court and judge which initially entered the consent decrees. In such a case, objections based on comity and abstention fall away.

In this case there were several motions to consolidate or transfer cases to District Judge Pointer. The first, filed by some respondents on August 4, 1983, sought consolidation of these claims with the consent decree cases. J.A. 129.[29] A series of motions were thereafter filed by petitioners seeking transfer of cases to Judge Pointer or consolidation with other cases. Respondents opposed transfer and consolidation without an agreement between the judges. Transcript of March 30, 1984 hearing, 4-7. After a period of several months, the cases were all consolidated before Judge Pointer in a single master file. J.A. 207, 218.

Once these cases were channeled into a single forum, any risk of inconsistent judgments and duplicative litigation dissipated. Moreover, as illustrated in this case, the fears on the part of petitioners of inconsistent judgments are unjustified given the tools available to channel related federal litigation into a single federal forum. While most litigation pertaining to a single consent decree will be filed in the same district as that in which the decree was entered, transfer is available to ensure that any case filed in another district is

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[29]No ruling was ever entered on the motion; however, Judge Pointer stated that he viewed consolidation with the consent decree case inappropriate due to the voluminous record in the old case and the filing of a separate suit was "to some degree advantageous." J.A. 118.

While repsondents and petitioners both moved to consolidate some of these cases with the consent decree case, Judge Pointer and Judge Acker both denied consolidation. J.A. 129, 144; PX 11, R1-29 (entry of Nov. 29, 1983, motion to consolidate reverse discrimination case and consent decree case denied by Judge Pointer); Transcript of March 30, 1984 hearing, 3-4. *See also* PX 11, R1-29 at Nov. 4, 1983 entry (Opposition of Martin petitioners to post-judgment application to intervene in consent decree case). Should this Court take the view that respondents' claims should be heard as a part of the consent decree litigation, it may direct the district court to consolidate the cases on remand.

transferred to the court which entered the decree. 28 U.S.C. §§ 1404(a), 1631. Similarly, consolidation under Rule 42 and cooperation among the judges will resolve any risk of inconsistency or duplication.

Petitioners also argue that the collateral attack bar is essential to further the policy of encouraging settlements. While this policy is important, their means is an improper way of advancing it. In effect, petitioners argue that it is necessary to make it harder for third parties to challenge consent decree conduct because their challenges may interfere with the enforcement process. Petitioners also suggest that settlement is advanced if third party challenges are heard sooner rather than later. But this concern may be fully vindicated by their joining potential third parties — at least those who are known to them. Their argument for placing the burden to intervene on third parties is really nothing more than an attempt to preclude third parties by obtaining an effective bar before the third parties act. In any event, making it harder for third parties to protect *their* rights is an improper means to facilitate settlement by other parties because there is no basis for preferring the rights of parties to the decree to the rights of third parties. A still better solution, from petitioners' viewpoint, would be to hold that third parties cannot even intervene, that they are stuck with whatever settlement the parties reach. This would obviously be improper. We submit that the watered-down version of this proposal embodied in the collateral attack bar is equally improper. *See* Kramer, *supra*.

IV. IF NONMINORITIES ARE TO BE BOUND BY A PROPOSED DECREE, THE DECREE PARTIES SHOULD BE REQUIRED TO MANDATORILY JOIN NONPARTIES, AND, WITHOUT JOINDER, THE ELEVENTH CIRCUIT'S RULE PERMITTING RESPONDENTS' SUITS IS A REASONABLE PROCEDURAL DEVICE DESIGNED TO ENSURE DUE PROCESS.

Respondents submit that burdening the individual respondents with the duty to intervene in the course of the

Jefferson County litigation is unreasonable. The questionable standing of the individuals to participate and their uncertainty about whether they need to bear the expenses of litigating mean that third parties will often discover that their rights have been compromised but that it is already too late to move to intervene. Petitioners claim the collateral attack bar saves judicial resources and litigation costs. On the contrary, the rule advocated by petitioners will encourage protective and often unnecessary intervention applications which will unduly expand the breadth of discrimination litigation. In fact, under petitioners' proposed rule, every employee of every employer sued for race discrimination may be placed in the position of having to hire counsel to intervene to protect his or her position in the workforce. Such a burden has never been placed on strangers to litigation. *See, Chase National Bank v. Norwalk,* 291 U.S. 431, 441 (1933) ("law does not impose . . . the burden of voluntary intervention"). *See also, Cooper v. Federal Reserve Bank of Richmond,* 467 U.S. 867 (1984) (individual unlitigated claims of class members not precluded despite the fact that other class members intervened to assert individual claims).

In order to have standing, a party must have a recognizable interest which is traceable to the defendant's allegedly unlawful conduct. *Allen v. Wright,* 468 U.S. 737 (1984); *Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91 (1979). The rules of Article III standing apply to intervenors as well as original parties to the litigaton. *Diamond v. Charles,* 476 U.S. 54 (1986).

The City of Birmingham has some 3,000 employees. Over 600 are BFRS employees. It is wholly unrealistic to require each individual BFRS employee to take notice in 1975 through newspaper stories of the pendency of litigation, to learn that the litigation involves rights to promotional positions rather than hiring discrimination, to foresee that their employer will settle rather than litigate and that they will be the ones to bear the burden of that settlement through implementation of the quotas. Such an individual's interest in the litigation would certainly be speculative at best. *See* Cooper, *supra.*

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Similarly, in 1981, it was unreasonable to require hundreds of BFRS employees to seek to intervene in order to protect their right to a promotion which they might decide to seek in the future and which might be denied if they obtain a score high enough to be certified.[30]

The union also cannot act as the surrogate for the employees. It represents a broad spectrum of employees, black and white, officers and privates, those with seniority and those without, as well as those who intend to seek promotion and those who do not. J.A. 382-384, 548-549. *See Wygant, supra,* at 281 n.8.

Given the speculative nature in 1975 of the respondents' interest in the *Jefferson County* litigation, it is certainly unreasonable to place the burden on the individual nonminority employees of the City, not to mention persons who are not yet City employees, J.A. 382, to intervene in the litigation. *See Safir v. Dole,* 718 F.2d 475 (D.C.Cir. 1983) (Scalia, J.) (Safir's possible future reentry into the shipping business deemed too speculative to confer standing). Moreover, protective intervention adds to the high cost of litigation of the existing parties as well as subjects the intervenor to the possible assessment of attorney's fees if the defendant is ultimately deemed liable. *See, Diamond v. Charles,* 476 U.S. 54, 70 (1986); *Reeves v. Wilkes,* 754 F.2d 965 (11th Cir. 1985). Such costs and risks are simply too high to preserve the future rights of nonparties to object to a potentially illegal consent remedy.

Moreover, petitioners' claim that respondents should have intervened in *Jefferson County* contradicts the position which they took in the appeal from the intervention proceedings that Gray, Sullivan and the BFA lacked a litigable interest which would support intervention. In 1983, the City told the Eleventh Circuit that the appellants lacked standing. *See* J.A. 549 ("with respect to the promotional goals the Firefighters fail to show a sufficient direct and personal injury to its members"). Similarly, the Martin petitioners claimed the appellants lacked "standing to seek appellate review of the

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[30]Only a small portion of those passing the Fire Lieutenant's examination are ever certified. PX 23, R1-25.

consent judgments." Brief of John W. Martin, 23, *United States v. Jefferson County*, No. 81-7761 (11th Cir.).

Consent decree parties have an adequate remedy through joinder of nonparties under Rule 19, F.R.Civ.P. Such a mechanism clearly provides the nonparty with a full complement of due process safeguards by notice through a summons, a date certain after which default may be entered, the tools of discovery, the opportunity to be heard through a full evidentiary hearing, and, most important, the right to appeal any adverse decision. Just as the employer believes the nonparty should perceive its interest and intervene, so too may the employer perceive the interest of the nonparty and join the nonparty at the appropriate time. The employer has sophisticated counsel with knowledge of the proposed consent decree and the skills to perceive the potential interest of the nonparty while the nonparty has no counsel or intimate knowledge of the federal court proceedings.[31] Had Birmingham wished to bind the respondents to its settlement, it could have joined them under Rule 19 or refrained from opposing intervention. The fact that joinder will involve some cost should be of no consequence. *See*, Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987 Legal Forum 103, 144-153. Given its opposition to intervention, the City should not now be allowed to complain. Each time a complex claim of discrimination is brought before the courts involving diverse and competing interests, there are significant costs in terms of the litigation expenses and liability exposure of the parties as well as the allocation of scarce judicial resources. If the City desires to engage in a settlement the cost of which some third party is likely to bear, it should pay the price of either joining those parties in the litigation or facing the claims of those third parties in the future. Shifting the entire cost of settlement to innocent third parties should not be permitted. As

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[31]As in this case, consent decrees normally emerge "from a series of secret, informal negotiations . . . " Comment, *Consent Decrees and the Judicial Function*, 20 Catholic L.J. 312, 315 (1970). The employer's counsel, rather than unrepresented nonparties, clearly has superior knowledge of such proceedings.

Mayor Arrington has testified, the consent decree was "the best business deal [the City] had ever struck." J.A. 526. This Court should not countenance "business deals" at the expense of strangers to the litigation.

In ensuring the rights of respondents to due process, the Eleventh Circuit found that respondents' claims against their employer are due to be heard in the context of independent suits. Such a rule is a reasonable procedural device which certainly preserves the due process rights of respondents to have their claims heard. To the extent other courts devise procedural mechanisms which also ensure due process in the context of other cases, such procedures may also be deemed acceptable by this Court. *See* Kramer, *Consent Decrees and the Rights of Third Parties*, 87 Mich.L.Rev. ___ (Nov. 1988). However, since the Eleventh Circuit's approach is an acceptable means of protecting the due process rights of all parties, there is no reason for this Court to *prohibit* third party suits such as those filed by respondents. Moreover, respondents believe their suits are the preferable means of resolving these types of claims, in view of the ability of the court not only to consider the facial validity of a decree-embodied plan, but also the conduct of the parties in implementing the plan. *See, e.g., Johnson v. Transportation Agency*, 480 U.S. ___, 107 S.Ct. 1442 (1987) (goal should be flexible based on the availability of minorities in relevant labor pool at the time of the preferential promotion rather than fixed at the time the plan is adopted); *Fullilove v. Klutznik*, 448 U.S. 448, 480-481 (1980) (Court only approved facial validity of set-aside statute and did not foreclose future challenges on a case-by-case basis).

V. UNDER ANY OF THE PROPOSED RULES, RESPONDENTS SHOULD NOT BE BOUND BY BIRMINGHAM'S SETTLEMENT.

Under any of the varous rules proposed by the parties in this case, it is clear that respondents are entitled to have their claims heard, and that the consent decrees are not entitled to be given any preclusive effect. Respondents are not parties to the decrees, they were not joined under Rule 19, their

interests were not represented by others, and they did not bypass any opportunity to intervene.

The nonminority Birmingham firefighters sought to intervene several weeks prior to the entry of the 1981 consent decrees. The district court, at the insistence of the decree parties, denied intervention as untimely. The Eleventh Circuit upheld the denial of intervention holding that the claims of the individual firefighters had not accrued at the time of the approval of the decrees. The court emphasized, however, that individual firefighters who are subsequently harmed by the implementation of the decrees were free to file individual suits at a later date alleging the specific violation of their rights. J.A. 156-159. The City did not seek review by this Court of that decision. Certainly no "adequate" opportunity to intervene was bypassed on the facts of this case.

Moreover, no formal or actual notice sufficient to abrogate constitutional rights was provided to the respondents. While the respondents were all City employees during the settlement process, the City conducted its negotiations secretly and then refused to notify parties who were known by the City to be "interested" in the proceedings. To compound the matter, the City published a "notice" that deceptively misled the reader. At the same time, the City went to great lengths to mail a detailed notice to its black employees. On its face, the procedure for the provision of notice was inadequate given the differences in content and the method of service upon similarly situated employees.

A consent decree is merely a tool to effect the settlement of litigation. Consent decrees therefore have limited usefulness and effect. Parties who seek repose and finality would be better occupied by concentrating their efforts toward the construction of valid affirmative action plans and the careful implementation of those plans as opposed to the creation of devices to cut-off third party claims even before they accrue.

The race based conduct of a public employer must be carefully policed and must always be subject to a strict and searching scrutiny by the courts. To date, Birmingham has successfully avoided the scrutinous review of its decree and

its conduct in light of the standards laid down by the Constitution and Title VII. The district court's fairness hearing only determined whether the "settlement represents a fair, adequate and reasonable compromise of the issues between the parties to which it is addressed. . . . " Pet. App. 246a. Lower courts should no longer be allowed to avoid the claims of nonminorities who seek to question the validity of affirmative action plans embodied in consent decrees. Employers should no longer be permitted to saddle innocent unrepresented employees with the entire cost of the employers's past discrimination. At a minimum, the employer should be required to pay damages to the nonminority employees harmed by the process of implementation of the settlement. *See, W. R. Grace & Co. v. Local Union 759*, 461 U.S. 757 (1983). The collateral attack bar, coupled with a denial of intervention in the instant case, can no longer be tolerated in a society where due process is guaranteed to all citizens.

While the district court refused to evaluate the defendants' conduct as distinct from the question whether such conduct was mandated by the consent decrees, no appellate court has yet ruled upon the legality of the decrees or upon the conduct of the employer undertaken under the guise of the decrees. The Eleventh Circuit has wisely rejected a rule which would prohibit nonparties who are denied intervention from contesting the legality of race-based voluntary conduct in subsequent proceedings. The Eleventh Circuit's rule is consistent with the historic notion that nonparties are not bound by judgments to which they have not submitted either personally or through their privies.

While it is laudable to extoll the merits of negotiated settlements, voluntary compliance, and repose, such benefits cannot come at the expense of unconsenting parties. Respondents earnestly seek a day in court to contest the unconstitutional and illegal conduct of their employer without having to carry the millstone of their employer's settlement.

CONCLUSION

For the foregoing reasons, respondents Robert K. Wilks, *et al.* request that this Court affirm the decision of the United States Court of Appeals for the Eleventh Circuit and remand for further proceedings as mandated by the decision of the Eleventh Circuit.

Respectfully submitted,

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No. 81-7761

IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

JEFFERSON COUNTY, *et al., Defendants-Appellees.*

JOHN W. MARTIN, *et al., Plaintiffs-Appellees,*

v.

CITY OF BIRMINGHAM, *et al., Defendants-Appellees.*

ENSLEY BRANCH OF THE N.A.A.C.P., *et al., Plaintiffs-Appellees,*

v.

GEORGE SEIBELS, *et al., Defendants-Appellees.*

BIRMINGHAM FIREFIGHTERS ASSOCIATION 117, *et al.,*
Applicants for Intervention,
Appellants

On Appeal From The United States District Court
For The Northern District Of Alabama
Southern Division

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No. 81-7761

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JEFFERSON COUNTY, ET AL.,
Defendants-Appellees.

JOHN W. MARTIN, ET AL.,
Plaintiffs-Appellees,
v.
CITY OF BIRMINGHAM, ET AL.,
Defendants-Appellees.

ENSLEY BRANCH OF THE N.A.A.C.P., ET AL.,
Plaintiffs-Appellees,
v.
GEORGE SEIBELS, ET AL.,
Defendants-Appellees.

BIRMINGHAM FIREFIGHTERS ASSOCIATION 117, ET AL.,
Applicants for Intervention,
Appellants

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

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Certificate of Interested Persons

The undersigned counsel of record certifies pursuant to Eleventh Circuit Local Rule 13.6.1 that, other than counsel of record, the following listed persons, corporations and associations have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Richard Arrington, Jr.
Walter R. Ball
James A. Bennett
Birmingham Firefighters Association Local 117
Sam Coar
City of Birmingham
Floyd E. Click
Joseph W. Curtin
Joel Alan Day
Lane L. Denard
Ensley Branch of the N.A.A.C.P.
Major Florence
Billy Gray
Charles Howard
Jefferson County, Alabama
Jefferson County Commission
Jefferson County Personnel Board
James B. Johnson
Henry P. Johnston
John W. Martin
Hiram Y. McKinney
Alvin Mahaffey, Jr.
Ida McGruder
James D. Morgan
William Moss
Donald Nixon
Gene E. Northington
Tommy Sullivan
Eugene Thomas
Wanda Thomas
Vincent Joseph Vella

Stephen L. Spitz
Stephen L. Spitz

Statement Regarding Preference

This case is not entitled to any preference in its processing or disposition.

Statement Regarding Oral Argument

Contrary to the statement of appellants in their request for oral argument, this appeal raises no important constitutional issues. Since the appellants clearly lack standing here to challenge the merits of the final judgment, their appeal raises only the narrow issue of their right to intervene in the court below. There is no need for oral argument.

STATEMENT OF THE ISSUES

1. In suits brought to redress alleged discrimination on the basis of race and sex in the hiring and promotion of municipal employees, did the district court err in denying a motion by white, male firemen to intervene as defendants and for leave to file an answer denying generally the allegations of the complaint, which motion and proposed answer were filed more than seven years after the suits were filed, more than two years after the trial on the merits, two months after the court had provisionally approved a negotiated settlement, and after the applicants for intervention had already, without yet having filed any motion to intervene, participated in a fairness hearing on the proposed settlement?

2. Did the district court, having received and considered argument of the movants in support of their motion, err in not setting an evidentiary hearing on the motion?

3. Do appellants have standing to challenge in this Court a final consent judgment, entered between the existing parties and which orders no relief against appellants, simply by filing a notice of appeal after having been denied intervention as a party below?

STATEMENT OF THE CASE

Earlier proceedings in this case were recounted by this Court in its opinion in Ensley Branch of NAACP v. Seibels, 616 F.2d 812 (5th Cir.), cert. denied, 449 U.S. 1061 (1980). We will here relate only such portions of those proceedings, as well as more recent proceedings, as are relevant to the particular issues posed by this appeal.

In January 1974 the private plaintiffs below filed two actions in the District Court for the Northern District of Alabama against officials and agencies of the City of Birmingham and Jefferson County, Alabama, alleging racially discriminatory employment practices in violation of title VII of the Civil Rights Act of 1964 (42 U.S.C. §§2000e, et seq.). Record on Appeal (hereinafter "R.A."), Vol. 2, pp. 322-33; Vol. 3, pp. 484-93. On May 27, 1975 the United States filed its action against the same and other defendants alleging a pattern and practice of discriminatory employment practices directed against both blacks and women. R.A., Vol. 1, pp. 1-7. All three suits prayed for an order requiring that blacks be hired and promoted in sufficient numbers to overcome the effects of past discrimination. R.A., Vol. 2, p. 332 at c(ii); Vol. 3, p. 492 at (b)(iv); Vol. 1, pp. 6-7 at d(3).

When the first two suits were commenced in 1974, Billy Gray, a white Lieutenant in the Birmingham Fire Department and one of the appellants herein, consulted with the Director of the Jefferson County Personnel Board, a defendant in all of the three suits here on appeal, "concerning the status of the Birmingham Firefighters Association and the Firefighters in general, as far as the . . . litigation [was] concerned." Affidavit of Billy Gray.[1/] After Lt. Gray and the Firefighters[2/] had assured themselves that the Personnel Board would adequately represent their interests, the Firefighters decided that they would not intervene as a party in the litigation. Id. at 2. Nonetheless, as stated by appellant Gray, "During the intervening years in which these suits have been tried and appealed, we kept in contact with the Personnel Board and assisted them by supplying pertinent data requested by them." Id. at 2.

In December 1976 a trial on the merits was held to determine whether two particular tests used by the Personnel Board to screen and rank applicants for police officer and firefighter were racially discriminatory. The district court found that they

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1/ Although the Motion to Intervene filed by the Firefighters appears at pp. 305-07 of the Record on Appeal, Volume 1, the accompanying Affidavit of Billy Gray, dated August 4, 1981, was omitted. We have designated the Affidavit in a letter to the Clerk of the District Court.

2/ We will sometimes refer to all of the appellants here collectively as the "Firefighters."

were and on January 10, 1977, entered an order which this Court has described as follows:

> [T]he Court ordered that blacks be referred for openings on the police and firefighter forces at the rate at which they took the tests when most recently administered. To accomplish this, the Court ordered that the names of a sufficient number of blacks be added to the current police and firefighter eligibility lists so that the lists shall be representative of the racial composition of the test-takers, i.e., 28 and 14 percent black for police and firefighter lists, respectively; that, one-third of the future certifications, i.e., referrals from the lists for actual employment, are to be black until, considering all certifications since the relevant 1975 and 1976 dates, the numbers of certifications become representative of the racial composition of the test-takers. Thereafter, blacks are to be certified in accordance with their representation on the lists, i.e., 28 and 14 percent of certifications for policemen and firefighters, respectively, will be black. Similarly, referrals from future lists will be a function of the rate at which blacks take the examinations on which the lists are based, until or unless defendants develop valid tests.

616 F.2d 812 at 815, n.6.

The defendants did not specifically challenge this form of relief and this Court remanded the case to the district court to consider whether the relief should be extended to periods preceding the 1975 and 1976 dates. 616 F.2d at 825.

Thereafter, in August and October 1979 a second trial was held on some of the remaining issues, relating to both race and sex discrimination, including the validity of various examinations, rules affecting promotional opportunities, certain

physical and educational requirements and certain job announcement practices. R.A., Vol. 1, p. 310. While these issues were awaiting the court's decision, the parties commenced settlement negotiations that continued for the next several months. R.A., Vol. 1, p. 311.[3/] In early June 1981 the parties submitted to the court for its approval two proposed consent judgments, one disposing of all of the issues in each of the three suits concerning the Personnel Board and the other disposing of the issues concerning the City of Birmingham. The proposed decrees included relief, parallelling that of the 1977 order with respect to entry level hiring, for elimination of certain qualifying restrictions for promotion, the discontinuance of certain test procedures, and establishing certain goals and timetables for the employment and promotion of women and blacks. On June 8, 1981 the district court entered an order that provisionally approved the consent decrees, provided for public notice of the proposals, invited interested parties to file objections and supporting briefs, and set a fairness hearing for August 3. R.A., Vol. 1, pp. 295-97.

3/ The parties here referred to are all of the plaintiffs, on the one hand, and the defendant Personnel Board of Jefferson County and the defendant City of Birmingham, on the other. Other defendant government bodies and officials did not participate in settlement.

On July 14, 1981 the Firefighters filed a motion for leave to appear in the proceedings and to file a brief amici curiae with accompanying written objections. 2nd Supp. R.A., pp. 1-3. The motion was granted. 1st Supp. R.A., Vol. 7, p. 7. In opposing the proposed decrees, the Firefighters urged that the decrees, if entered, "will have a severe and material impact upon the presently employed firefighters of the City of Birmingham and the members of the Firefighters Association regarding their potential for future advancement and promotion, the qualifications of those persons who are placed in positions of authority over the presently-employed firefighters, and the general welfare and safety of the presently-employed firefighters when fighting fires or otherwise engaging in emergency rescue activities." 2nd Supp. R.A., p. 2. In their objections they specifically note that if the court rejected the proposed decrees the parties could appeal, but that if the court approved the consent decrees the Firefighters would have no recourse. Objections of Firefighters, July 14, 1981, p. 14.[4/]

4/ On July 14, 1981, the Firefighters Association filed a document in the District Court entitled "On Behalf of Birmingham Firefighters Association 117 and Billy Gray: Motion for Leave to Appear and File Brief Amicus Curiae, Petition of Birmingham Firefighters Association 117 and Billy Gray to Appear as Interested Persons and Brief." On p. 2 of the "Petition" portion of this document, the firefighters state that they "respectfully request the Court to accept the following brief as objections to the proposed Consent Decree from interested persons within the meaning of the Court's June 8, 1981 Order." Thus the objections are in the "Brief" portion of the document. The "Petition" and "Brief" portions attached to the "Motion" were apparently omitted from the record on appeal designated by appellants. We have designated the entire document in a letter to the District Court Clerk.

Nonetheless, the Firefighters did not at this time file a motion to intervene as parties.

On August 3, 1981 the district court held the scheduled fairness hearing to determine whether the proposed decrees were "unreasonable, unfair, inadequate, inequitable, illegal, unconstitutional, or against public policy." R.A., Vol. 1, p. 312. Counsel for the Firefighters appeared at the hearing and argued that the decrees should not be entered as proposed. During the course of the hearing, counsel for the Firefighters agreed that the Firefighters were appearing as amicus curiae, not as a formal party, and announced that they would file a formal motion to intervene as a party after the fairness hearing. 1st Supp. R.A., Vol. 2, pp. 7-8. The court stated that it doubted such a motion would be timely. Id. at 70-71. The Firefighters declined an invitation to present any evidence at the fairness hearing. Id. at 10.

On August 4, 1981 the Firefighters filed their motion to intervene, asserting that

> . . . said Decrees will materially affect the qualifications of the future co-employees of intervenors, the provisions of the Decrees will constitute discriminations against intervenors on the basis of race and sex, the Decrees will affect the potential advancement in grade of currently employed firefighters, the Decrees will materially affect the level of on-the-job safety of Birmingham firefighters, the Decrees will affect the quality of service provided

> to the public, and the Decrees will adversely affect substantial rights of intervenors protected by Title 7 of the Civil Rights Act and the Constitution of the United States.

R.A., Vol. 1, pp. 306-07.

The Firefighters submitted with their motion a proposed answer denying generally all of the allegations in each of the three complaints in each of the three pending actions. Answer of Intervenors, August 4, 1981.[5/]

On August 5, 1981 the Firefighters filed, with leave of the court, a "Reply Brief of Firefighter Objectors", presenting further arguments in opposition to the entry of the proposed consent decrees. 3rd Supp. R.A., Reply Brief of Firefighter Objectors, pp. 1-4. In this brief, the Firefighters noted that they had filed a motion to intervene under Fed. R. Civ. P. 24 and that they "feel that intervention is necessary to preserve our rights to object to the provisions of the Decrees." Id. at 4.

On August 17, 1981 the Firefighters submitted to the district court, in letter form, a written argument in support of their motion to intervene. Letter to Hon. Sam C. Pointer, Jr.

5/ We have designated the Answer of Intervenors in a letter to the Clerk of the District Court.

from Raymond P. Fitzpatrick, Jr., dated August 17, 1981.[6] In their argument, the Firefighters acknowledged that "[t]he defendants vigorously opposed the actions through two trials and an appeal", and that "[p]rior to the proposed settlement, the named defendants (especially the Personnel Board) fought all possible relief." Id. at 1-2. The Firefighters urged, however, that they now be permitted to intervene formally because by agreeing to the proposed consent decrees the defendants were no longer representing the interests of the Firefighters. Id. at 2-3.

On August 21, 1981 the district court denied the appellants' motion to intervene, stating:

> This litigation has been pending for over five years and has been vigorously contested by the existing parties through the two trials and one appeal. While the Firefighters and Gray were permitted to be heard in opposition to the settlement, and the Court fully considered their objections, intervention at this time as parties to the litigation is clearly untimely and must be denied.

R.A., Vol. 1, p. 320.

On the same day, the district court approved the consent decrees.[7]

6/ We have designated this document in a letter to the Clerk of the District Court.

7/ We have designated this document in a letter to the Clerk of the District Court.

SUMMARY OF ARGUMENT

The appeal should be dismissed because the appellants, having properly been denied intervention in the court below, are not proper parties to prosecute this appeal.

1. Denial by the district court of appellant's motion for intervention upon the ground that it was "untimely" was clearly correct. None of the criteria applicable in determining timeliness under Stallworth v. Monsanto Co., 558 F.2d 257 (5th Cir. 1977) was satisfied in this case. First, appellants delayed their motion to intervene seven years after learning of their interest in the case. Second, since two trials had already been held and the issues sought to be litigated by the intervenors had been definitively resolved by a settlement negotiated among the parties and approved by the court, the delay in intervention, were intervention granted, would have clearly prejudiced the existing parties by upsetting agreements carefully arrived at, by requiring further and redundant litigation on the same issues and by delaying the full realization of plaintiffs' rights. Third, appellants are not prejudiced by denial of their application for intervention because, to the extent they might have any right to attack collaterally the consent decrees (and we believe they have none), they can do so in a separate proceeding. Fourth, there are here no unusual circumstances warranting departure from the

general rule that an interested party may not intervene in a case after the parties have settled their dispute by agreement. The mere unhappiness of appellants with the particular terms of the agreement is not such an "unusual circumstance" as to warrant intervention.

2. Failure of the district court to offer appellants an evidentiary hearing on their motion to intervene was no error because the record was clear as to all facts necessary to the district court's determination.

3. If appellants' motion to intervene is regarded not as an effort to reopen and relitigate in the court below but rather as a gambit for standing to appeal, it still must fail. Even a party may not appeal unless it has an "appealable interest", i.e. a legally protected interest that will be impaired or destroyed by the judgment. Here, the judgment gave no relief against the appellants and they have no legally protected interest, by contract or otherwise, that it impairs. Accordingly, even if appellants had successfully intervened below, they would not be proper parties for this appeal.

JURISDICTION

This Court lacks jurisdiction because no party with an appealable interest has filed a proper notice of appeal.

ARGUMENT

By this appeal the Birmingham Firefighters Association and two of its members ask this Court to review the merits of consent judgments entered into by proper parties to this litigation after two trials on the merits, after lengthy and painstaking negotiations, and after a fairness hearing, participated in by the appellants, in which the district court determined that the proposed "settlement represents a fair, adequate and reasonable compromise of the issues between the parties to which it is addressed and is not inequitable, unconstitutional, or otherwise against public policy." R.A., Vol. 1, pp. 319-20.

We note at the outset appellants' procedural ambiguity. Although they filed with their motion to intervene in the district court a proposed answer denying generally the allegations of the complaint, thus evincing an intent to relitigate the factual and legal issues that had been tried and settled, on this appeal they submit a brief suggesting that the

see affidavit of Gray

Court now rule upon the issues as though the appeal were by an existing party. Whether viewed only as an appeal from denial of intervention or as an appeal on the merits of the consent decrees, the Firefighters' appeal should be dismissed.[8/]

I. The District Court Properly Denied the Firefighters' Motion to Intervene as Untimely.

The Firefighters argue that their motion to intervene should have been granted as a matter of right pursuant to Fed. R. Civ.

8/ We do not reach the issue of the merits of the consent decrees (Appellants' Brief 1, Issues III through VII) because we believe it is not properly before this Court. We do believe, however, that the decrees are clearly valid and should this Court at any stage of this proceeding reach the merits of that issue we request an opportunity to brief it. For present purposes, we note merely that United Steelworkers v. Weber, 443 U.S. 193 (1979), which appellants say "left open" an issue controlling in this case, did not in terms leave open the question of race-conscious affirmative action in the context of court ordered remediation -- whether after adjudication or by consent judgment. It left open only the question of voluntary state action "to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories." See 443 U.S. at 209. In any event, the propriety of court ordered, race-conscious, affirmative action relief has since been definitively settled for the Fifth Circuit by United States v. City of Alexandria, 614 F.2d 1358, 1365-66 (5th Cir. 1980). The en banc decision in United States v. City of Miami, 664 F.2d 435 (5th Cir. 1981), concerning the right of an employee bargaining representative (which the Firefighters are not) to a trial before relief is granted that is inconsistent with the terms of a current bargaining agreement, in no way detracts from the precedential force of Alexandria. Indeed, the opinion of Judge Rubin, which was adopted as the mandate of the Court, specifically states that "[a] consent decree may properly include provisions requiring the defendant to take affirmative action rectifying the effects of past discrimination." 664 F.2d at 442.

P. 24(a). App Br at 12.[9/] While conceding that such a motion must be "timely", they urge that it was so under criteria articulated in Stallworth v. Monsanto Co., 558 F.2d 257 (5th Cir. 1977). While we agree that Stallworth governs, Stallworth requires affirmance.

In Stallworth, several white employees of the Monsanto Company sought to intervene in a class action by black employees under title 7 of the Civil Rights Act of 1964. The blacks negotiated a consent judgment which, among other things, modified the seniority system for Monsanto employees in a way that disadvantaged the whites. The white employees, asserting that this violated the terms of their collective bargaining agreement with Monsanto, sought to intervene as plaintiffs for relief against Monsanto. They abjured, however, any attack on the terms of the consent decree itself and, although Monsanto opposed their intervention, the black plaintiffs did not. 558 F.2d at 262. In reversing the district court's denial of the motion to intervene, the court of appeals weighed the following four factors in determining "timeliness":

> Factor 1. The length of time during which the would-be intervenor actually knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene. . . .

9/ Appellants' brief in this Court will be referred to as "App Br".

> Factor 2. The extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case . . .
>
> Factor 3. The extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied. . . .
>
> Factor 4. The existence of unusual circumstances militating either for or against a determination that the application is timely.

558 F.2d at 264-66.

In determining the application in Stallworth "timely", the court of appeals found with respect to three of the above-numbered factors (1) that the white employees did not know of their interest until just one month before they filed their motion and that they did not dawdle in filing, (2) that neither the plaintiffs nor Monsanto could have been harmed by the 30-day delay, and (4) that there was an unusual circumstance favoring intervention because the plaintiffs had opposed an earlier request by Monsanto for permission to notify its white employees of the potential impact of the decree on the seniority system. Having found that three of the factors strongly favored the timeliness of the intervention, the court found it unnecessary to consider the extent to which the white employees might be prejudiced by denial of their motion. 558 F.2d at 267.

Here, all four Stallworth criteria point to the untimeliness of the Firefighters' motion.

First. The Firefighters knew the potential impact on their interests when the suits were filed in 1974 and 1975. Indeed, this is conceded in the affidavit of Billy Gray (addendum to App Br), in which he states that he consulted with the director of the Jefferson County Personnel Board in 1974 concerning the interest of the Firefighters in the litigation.

Second. Prejudice to existing parties by delay in filing is here obvious. In contrast to the Stallworth intervenors, who sought to raise new issues and did not challenge the propriety of the consent decree, the Firefighters seek to reopen and defend issues and allegations that have already been the subject of two trials and of long and difficult negotiation. To jettison the work done and to start the process again with an expanded cast of characters would unavoidably prejudice the existing parties. Other of the cases relied upon by the Firefighters involve, as does Stallworth, intervention for the purpose of raising and litigating issues not previously raised and litigated in the lawsuit wherein intervention is sought. E.g., McDonald v. E.J. Lavino Co., 430 F.2d 1065, 1072 (5th Cir. 1970) (the applicant "did not seek to reopen or relitigate any issue which had previously been determined"); Cohn v. EEOC, 569 F.2d 909 (5th Cir. 1978) (applicant did not challenge consent decree already

entered, but sought only participation in further proceedings); Missouri-Kansas Pipeline Co. v. United States, 312 U.S. 502 (1941) (intervention allowed to participate in enforcement of outstanding decree, rather than to challenge the decree itself). Such intervention is to be sharply distinguished from after-the-fact intervention, as here, where the applicant seeks to reopen and relitigate issues that would otherwise be in a state of judicial repose.

Third. The prejudice to the Firefighters, if any, from denial of their motion is minimal. Prior to their motion to intervene the Firefighters, through the same counsel who has filed their brief here on appeal, submitted to the district court an amicus brief addressing the same issues on the merits of the consent decree that the Firefighters seek to address here. The same counsel argued orally the views of the Firefighters at the fairness hearing of August 3, 1981. Such prior opportunity of an applicant for intervention to present and have its views considered by the Court is itself grounds for denying intervention. United States v. Marion County School District, 590 F.2d 146 (5th Cir. 1979); Jones v. Caddo Parish School Board, 487 F.2d 1275 (5th Cir. 1973).

The de minimis nature of any prejudice to the Firefighters is underlined by the recent filing by certain white, male

firefighter employees of the City of Birmingham, represented by the same counsel as are the Firefighters here, of a new lawsuit in the court below titled James A. Bennett, et al. v. Richard Arrington, Jr., et al., Civil Action No. CV 82P 0850S, that seeks to enjoin certain of the appellees here from implementing the promotional provisions of the consent decrees which are the subject of this appeal. While we believe the Firefighters cannot collaterally attack the consent decrees by any form of proceeding, the recent suit illustrates that they need not have been granted intervention in order to litigate their right to such an attack.

Fourth. There are here no unusual circumstances, such as withholding information from the applicant intervenors as in Stallworth, that bear on the appropriateness of intervention. The only unusual circumstance suggested by the Firefighters is that they relied upon the Personnel Board of Jefferson County to represent their interest throughout the seven years the lawsuits have been pending and that they did not realize that the Board's vigor was failing until the consent agreements were announced. But it should hardly have surprised the Firefighters that a public agency would be more responsive than the Firefighters themselves to this Court's earlier decision affirming a contested decree that provided race-conscious relief in entry level hiring

of police and firefighters, including stated percentage representation of blacks in Personnel Board certifications of qualified applicants and stated goals, by race, in hiring by the City of Birmingham. See Ensley Branch of NAACP v. Seibels, 616 F.2d 812, 815, n.6 (5th Cir.), cert. denied, 449 U.S. 1061 (1980).10/

Disappointment by some public employees concerning consent decrees negotiated by their public employers on promotion practices is neither unusual nor unpredictable. In Culbreath v. Dukakis, 630 F.2d 15 (1st Cir. 1980), certain unions of public employees moved to intervene in a discrimination suit brought by blacks against their common municipal employer. The motions were filed within two months after submission of a consent decree setting minority employment goals. In affirming denial of the motions, the Court of Appeals for the First Circuit, after noting the criteria applied by the Fifth Circuit in Stallworth, said:

10/ Any reasonable person or organization should have been aware that the Personnel Board might eventually agree to a settlement, since, as the District Court noted in its Memorandum of Opinion that "it can hardly be doubted that there is more than ample reason for the Personnel Board and the City of Birmingham to be concerned that they would in time be held liable for discrimination against blacks at the higher level positions in the police and fire departments," and that the consent decrees "by way of settlement for such potential liability, provides appropriate corrective measures reasonably commensurate with the nature and extent of the indicated discrimination" under existing case law. R.A., Vol. 1, p. 318.

> We see little merit in the unions' contention that, under the Stallworth test, they did not learn of their interest in the suit until the class was certified and the relief proposed in the consent decree was made known. . . . [I]n this instance, the existence of interest was obvious, see Stallworth v. Monsanto Co., 558 F.2d at 264, and the only lack related to its extent, a matter of degree, not of kind. . . . The expansion of relief [from that sought in the complaint] may well have increased the unions' internal political interest, but it did not alter their legal interest.

630 F.2d at 21.

Similarly in Hefner v. New Orleans Public Service, Inc., 605 F.2d 893 (5th Cir. 1979), cert. denied, 445 U.S. 955 (1980) a group of New Orleans bus drivers was barred by laches from bringing an independent action under 42 U.S.C. §1981 to challenge a consent decree in an earlier class suit under title 7 of the Civil Rights Act ordering an affirmative action program for black transit operators. Applying the Stallworth considerations, the court of appeals held that the "reverse discrimination" attack on the earlier decree, even were it otherwise sustainable as a collateral attack, had been inexcusably delayed and was therefore barred. Id. at 898.

Here, the Firefighters knew the full potential of the threat to what they perceived to be their interest at least as early as this Court's May 8, 1980 affirmance of the partial final judgment

in Ensley Branch of NAACP v. Seibels, 616 F.2d 812 (5th Cir.), cert. denied, 449 U.S. 1061 (1980). See supra, pp. 3-4. There are no unsual circumstances, any more than there were in Culbreath or Hefner, to excuse the delay.

II. The Firefighters Had No Absolute Right to an Evidentiary Hearing on their Motion to Intervene and the District Court Did Not Err in Failing to Offer Such a Hearing.

In this court the Firefighters indicate for the first time their desire for an evidentiary hearing on their motion to intervene in the court below and their belief that the lower court denied them such a hearing. App Br at 20-21.

At the beginning of the August 3, 1981 hearing on objections to the proposed consent decrees, counsel for the Firefighters stated for the first time their intent to request intervenor status. 1st Supp. R.A., Vol. 7, pp. 7-8. Later in the proceeding, when counsel repeated his intention to request intervenor status for the Firefighters, the Court responded, "It may be a little late, but I am hearing you." Id. at 23. At the conclusion of the hearing the Court stated in greater detail the reasons why it believed a motion to intervene untimely, to which counsel for the Firefighters responded, "I understand that, sir." Id. at 72. The following day the Firefighters filed their motion

to intervene. Neither in court on August 3, nor in their written motion, did the Firefighters request a further hearing. Indeed, the Firefighters declined to present any evidence when provided the opportunity to do so by the District Court. Id. at 10.

In now arguing that the district court erroneously denied them an evidentiary hearing, the Firefighters rely upon a narrow line of school desegregation cases concerning intervention by concerned parents as parties plaintiff. All of those cases, however, involved plaintiff intervention to raise new issues or new fact situations not previously litigated. Furthermore, the right to an evidentiary hearing in such cases is specifically predicated upon the rule in this Circuit, peculiar to school desegregation cases, that such issues may be raised by the concerned parents only through intervention if there is an already pending suit. See Adams v. Baldwin County Board of Education, 628 F.2d 895 (5th Cir. 1980). Here, the concerned white employees -- who have sought to intervene as parties defendant rather than as parties plaintiff -- are subject to no such barrier and a number of them have already filed a separate action in the district court raising the same substantive issues sought to be raised by the intervenors here. The right of the Firefighters here is governed not by the plaintiff intervenor decisions in school desegregation cases but by the holding of Fox

Publishing Co. v. United States, 366 U.S. 683, 694 (1961), that an evidentiary hearing on a motion to intervene is unnecessary where the record is already clear on the issues to be determined. Here, the record respecting untimeliness is both clear and undisputed. There was no need for an additional evidentiary hearing and none was requested.

III. The Firefighters Had No Right of Intervention to Perfect this Appeal and They Lack Standing to Seek Appellate Review of the Consent Judgments.

If the Firefighers' motion to intervene below is viewed as solely for the purpose of appeal, rather than for the purpose of participating in further proceedings below, the appeal must be dismissed for lack of an appealable interest.

Although this Court has at least provisional jurisdiction to review the denial of a motion to intervene, see Weiser v. White, 505 F.2d 912, 916 (5th Cir. 1974), cert. denied, 421 U.S. 993 (1975), where the motion to intervene is for the purpose of perfecting a right to appeal the movant/appellant must establish an "appealable interest." United States v. Imperial Irrigation District, 559 F.2d 509, 521 (9th Cir. 1977), modified on reh'g, 595 F.2d 525 (9th Cir. 1979). To sustain an appeal, the appellant's interest must be substantial, subsisting, and

personal. Mayer v. National Missile and Electronics, Inc., 326 F.2d 401 (9th Cir. 1964). Even where intervention has been granted, the intervenor may not appeal if the judgment is not adverse as to him, and a general adverse economic effect does not establish an appealable interest. Milgram v. Loew's, Inc., 192 F.2d 579 (3d Cir. 1951), cert. denied, 343 U.S. 929 (1952). And as a general rule, a nonsettling defendant may not appeal from a final consent judgment among other parties because the judgment is not final as to the nonsettling party. Goldstein v. Andresen & Co., 465 F.2d 972 (5th Cir. 1972); Darrow v. Southdown, Inc., 574 F.2d 1333 (5th Cir.), cert. denied, 439 U.S. 984 (1978).

The type of interest that an appellant must have is illustrated in United States v. City of Miami, 664 F.2d 435 (5th Cir. 1981), a case principally relied upon by the Firefighters. There, the attorney general filed suit against the City of Miami and two police officer organizations, the Fraternal Order of Police (FOP) and the Miami Police Benevolent Association, alleging racially discriminatory employment practices. Thereafter, the United States and the City negotiated a proposed consent decree which was approved by the district court over objections by the FOP. After further proceedings in the district court, during which the FOP urged that a full trial be held on the issues framed by the complaint, the FOP filed a notice of

appeal. Sitting en banc, a majority of this court ruled that since the district court in entering the consent decree had specifically retained the FOP as a party defendant, apparently for possible future enforcement action under the terms of the decree, the FOP was affected by the decree and should have had its day in court before being bound. In so concluding, the Court emphasized that under Florida law promotion of city employees was a subject for collective bargaining and that the FOP was the bargaining representative for its members. 664 F.2d at 446. Since the settlement agreement effectively altered the terms of the collective bargaining agreement, the court of appeals found erroneous "the trial court's determination that the decree does not affect the contractual relationship between the City and the FOP." Id. At the same time, however, it found that dismissal of the Miami Police Benevolent Association, which was not a bargaining representative (664 F.2d at 437-38), to have been proper.

Under Alabama law public agencies are precluded from entering into binding collective bargaining agreements with unions. See United Steelworkers v. University of Alabama, 430 F. Supp. 996, 1002 (N.D. Ala. 1977), aff'd, 599 F.2d 56 (5th Cir. 1979). Accordingly, neither the Firefighters nor its members have contractual rights that could be impaired by the decree. The Firefighters, like the Miami Police Benevolvent Association

in City of Miami, are simply interested bystanders with no litigable or appealable interest.

CONCLUSION

Because their motion to intervene below was properly denied and because they have no appealable interest, the appeal of the Firefighters should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that two copies of the foregoing Brief of appellees John W. Martin, et al., were served upon each of the following counsel of record, by first class, postage prepaid, United States mail, this 26th day of April, 1982, addressed as follows:

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Appeal #81-7761

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JEFFERSON COUNTY, et al.,

Defendants-Appellees.

* * * *

JOHN W. MARTIN, et al.,

Plaintiffs-Appellees,

versus

CITY OF BIRMINGHAM, et al.,

Defendants-Appellees.

* * * *

ENSLEY BRANCH OF THE NAACP, et al.,

Plaintiffs-Appellees.

versus

GEORGE SEIBELS, et al.,

Defendants-Appellees.

* * * *

BIRMINGHAM FIREFIGHTERS ASSOCIATION 117, et al.,

Proposed Intervenors, Appellants.

On Appeal from U. S. District Court for the Northern
District of Alabama, Southern Division

BRIEF OF DEFENDANT-APPELLEE CITY OF BIRMINGHAM

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BIRMINGHAM FIREFIGHTERS ASSOCIATION
117, et al., Appellants,

v. Appeal #81-7761

U.S.A., et al., Appellees.

The undersigned, counsel of record, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal:

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Tommy Sullivan
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Foster & Conwell
U. S. Department of Justice
City of Birmingham,
and the employees and citizens thereof
Bradley, Arant, Rose & White
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Jefferson County Personnel Board
Reeves & Still
Johnson, Barton, Proctor, Swedlaw & Naff
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STATEMENT REGARDING ORAL ARGUMENT

This appeal raises issues of whether (i) the district court abused its discretion in denying a labor organization's motion to intervene to challenge consent decress terminating seven years of fair employment litigation where the labor organization had no contractual relationship with the employer, whether (ii) the appellants have standing to challenge consent decree provisions governing hiring and employment requirements when such provision do not affect appellants, and whether (iii) the district court abused its discretion in approving the consent decrees as neither illegal nor unconstitutional and as fair, adequate, and reasonable. The legal issues are not novel and, accordingly, there is not any necessity that the matter be argued orally.

STATEMENT OF ISSUES ON APPEAL

1. Whether the district court abused its discretion in denying a labor organization's motion to intervene to challenge consent decrees terminating seven years of fair employment litigation where the labor organization had no contractual relationship with the employer.

2. Whether appellants have standing to challenge consent decree provisions governing hiring and employment requirements when such provisions do not affect appellants.

3. Whether the district court abused its discretion in approving the consent decrees as (i) fair, adequate, and reasonable, and neither (ii) illegal or unconstitutional.

STATEMENT OF THE CASE

For the convenience of the Court, the City of Birmingham adopts by reference the statement of the case in the Department of Justice brief.

SUMMARY OF THE ARGUMENT

Appellants' intervention attempt is untimely since the Firefighters failed to seek to intervene until this litigation had been pending for

seven years. Under the Stallworth v. Monsanto Co., guidelines it is clear that the trial court did not abuse its discretion in denying intervention. Appellants delayed many years after they knew, or should have known, of an interest in the lawsuit, placing a heavy burden on the union to justify intervention. Moreover, the exsisting parties to the litigation will suffer significant prejudice if intervention is allowed; in contrast, the Firefighters have made no showing of a judically-cognizable interest, much less prejudice.

With respect to hiring goals and requirements, the union lacks standing either in its own right or as the representative of its members. As the union failed to demonstrate it was adversely affected, it lacks standing in its own right. Likewise, the Firefighters' failure to show a sufficient and direct injury to its members prevents it from obtaining standing as the representative of its members.

A critical fact, with respect to both the union's request for intervention and the underlying merits, is the absence of a collective bargaining relationship between Birmingham and the Firefighters. As appellants concede: "In Alabama, public employee do not have collective bargaining rights." [Appellants' Br. at 37]. Thus, the right of these appellants to participate as parties in this litigation is tenuous.

The limited goals in the Birmingham decree represent a permissible remedy. In examining this comprehensive settlement of these

actions this Court should not be unmindful of the circumstances surrounding settlement. A careful and experienced district judge found:

> Employment statistics for Birmingham's police and fire departments as of July 21, 1981, certainly lend support to the claim made in this litigation against the City—that, notwithstanding this Court's directions in 1977 with respect to certifications by the Personnel Board for the entry-level police officer and firefighters positions and despite the City's adoption of "fair hiring ordinance" and of affirmative action plans, the effects of past discrimination against blacks persist. . . . In the fire department, 42 of the 453 firefighters are black and none of the 140 lieutenants, captains, and battalion chiefs are black.

(R. I., 317)

The challenged promotional and hiring goals fairly address this problem. The promotional goals in the decree are supported by the fact that discriminatory tests largely excluded blacks from the fire department for a period of time. The goals are temporary and do not altogether exclude whites even in the temporary period during which they operate. Significantly, Birmingham is not required to promote any unqualified candidate under the precise terms of its decree. Therefore, the Firefighters have failed to demonstrate that the trial judge abused his discretion in approving the consent decrees.

STATEMENT OF JURISDICTION

Jurisdiction exists, inter alia, under 42 U.S.C. 2000e et seq.

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE FIREFIGHTERS' MOTION TO INTERVENE

Plaintiffs contend that the trial court abused its discretion under F. R. Civ. P. 24 when it denied the Firefighters' Motion to Intervene as untimely. The linchpin of appellants' argument is their characterization of their request for intervention as one "of right" under F. R. Civ. P. 24(a).

A. Intervention Under Sections (a) and (b) of Rule 24

In the district court, appellants failed to characterize their proposed intervention as "permissive" or as of "right." Judge Pointer in his order simply stated that the motion was "clearly untimely" (R.I., 320). Retrospectively, however, appellants claim they were entitled to intervene under F. R. Civ. P. 24(a)(2). (Appellants' Br. at pp. 8, 12).

Several courts have enunciated a policy against private intervention under Rule 24(a)(2) in government enforcement litigation brought under Section 707 of Title VII. U.S. v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (5th Cir. 1975); EEOC v. United Air Lines, 515 F.2d 946 (7th Cir. 1975); U.S. v. San Diego County, 20 FEP Cases 1425 (S.D. Cal. 1977).[1/]

1/ Although attorneys for the Department of Justice have taken the lead role in this litigation, Judge Pointer's August 18, 1981 Order and Judgment also covered two private cases consolidated for trial with 75-P-0666-S; Ensley Branch of N.A.A.C.P., et al., v. Seibels, et al., CA 74-2-12-J; John W. Martin, et al., v. City of Birmingham, et al., CA 74-2-17-S.

These courts reason that private intervention is inappropriate in Section 707 pattern and practice suits which are brought to remedy widely based systemic discrimination. In U.S. v. Allegheny-Ludlum, supra, the Fifth Circuit upheld the trial court's denial of an application to intervene by the National Organization for Women ("NOW") made after a consent decree was entered in an action brought against nine steel companies alleging pattern and practice employment discrimination. Analyzing NOW's motion to intervene under Rule 24(a)(2), the Court of Appeals held that, although NOW obviously claimed an interest in the subject matter of the action, it failed to satisfy the other two prongs of the test for non-statutory intervention of right. In so ruling, the Fifth Circuit distinguished NOW's position from that of the union in EEOC v. American Tel. & Tel. Co., 365 F. Supp. 1105, aff'd in part, appeals dismissed in part, 506 F.2d 735 (3rd Cir. 1974), consent decrees upheld 556 F.2d 167 (3rd Cir. 1977) stating, "At any rate, we think a labor union which is a party to collective bargaining agreement represents a far stronger case for intervention than does an organization such as NOW." U. S. v. Allegheny-Ludlum, supra at p. 845 (emphasis added). The court distinguished NOW from a labor union administering a collective bargaining agreement stating:

> A labor union is elected to represent in collective bargaining the employees who depend on the company for their jobs and livelihood. When the company, as in American Tel. & Tel., enters into a settlement with the government in an effort to resolve complaints of alleged employment discrimination, the union derivatively acquires a mandatory duty to negotiate alternatives to the provisions - e.g., those relating to seniority or as in the Bell case pregnancy leave - of the existing collective bargaining contract. As the settlement contains

> features the legality or propriety of which is questionable, then the union may have a definite, cognizable interest qua union in contesting these features. Cf. Kilberg, Current Civil Rights Problems in Collective Bargaining Process: The Bethlehem and AT&T Experiences, 27 Vand. L. Rev. 81, 101, 106 (1974). Furthermore, the union's ability to protect its interest may well be impaired or impeded if it is not allowed to intervene in the settlement formalization proceedings. At the very least, it would be anomalous to assume in such cases that the employees' bargaining representative's interest is adequately served by the government or the employer.

Id.

Because of limitations dictated by Alabama law, discussed infra, the Firefighters posture is analogous to NOW.

Similarly, in Stallworth v. Monsanto Co., 558 F.2d 257 (5th Cir. 1977), an emplomment discrimination suit by blacks in which non-union white employees sought to intervene to contest the provisions of a consent order, the Fifth Circuit stated, "[S]hould the district court determine that no contract exists between the appellants and Monsanto, their interest in the case would not meet the challenge posed by Donaldson, and they would not be entitled to intervene as of right." Id. at p. 269. Thus, if no contractual relationship exists between the employees and the employer, the employees are not entitled to intervene as of right. Therefore, the question of whether the non-union white employees should be granted leave to intervene was addressed under permissive intervention standards.

These considerations are equally applicable to this case. Appellants acknowledge that Alabama public employees do not have collec-

tive bargaining rights. The Firefighters have no legitimate interest adversely affected because none of the goals proposed in the consent decree infringe upon contractually-secured employment rights. Thus, the Firefighters do not enjoy an unconditional right to intervene under F. R. Civ. P. 24(a)(2). Appellants' intervention status is correctly analyzed under the standards for permissive invention.

Even though the timeliness requirement applies to both forms of intervention a different standard is used to determine what is "timely," depending on the type of intervention sought. Not suprisingly, permissive intervention timeliness questions are judged by a more stringent standard. E.g., McDonald v. E. J. Lavino, 430 F.2d 1065, 1073 (5th Cir. 1971), quoting Barron & Holtzoff (Wright ed.); Diaz v. Southern Drilling Corp, 427 F.2d 1118, 1126 (5th Cir. 1970). Thus, appellants here face a difficult task in proving their motion to intervene was timely under F. R. Civ. P. 24(b).

B. Appellants' Motion to Intervene Is Not Timely

Rule 24 fails to define "timely," and the Advisory Committee Note furnishes no clarification. However, as recognized by the Supreme Court in NAACP v. New York, 413 U.S. 345 (1973):

> Whether intervention be claimed of right or as permissive, it is at once apparent from the initial words of both Rule 24(a) and Rule 24(b), that the application must be "timely." If it is untimely, intervention must be denied. Thus, the court where the action is pending must first be satisfied as to timeliness. Although the point to which this suit has progressed is one factor in determination of timeliness, it is not solely dispositive. Timeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review.

NAACP v. New York, supra at pp. 365-66 (1973). Accord, United Airlines, Inc. v. McDonald, 432 U.S. 385, 395-96 (1977).

Thus, "Timeliness is not a word of exactitude or of precisely measureable dimensions." McDonald v. E. J. Lavino Co., supra. Moreover, applying NAACP v. New York, timeliness is not limited to chronological considerations but is determined from all the circumstances. U.S. v. U.S. Steel Corp, 548 F.2d 1232, 1235 (5th Cir. 1977); Stallworth v. Monsanto Co., supra.

The Fifth Circuit in Stallworth formulated specific guidelines to inform trial courts in the exercise of their discretion. Four factors must be considered in passing on the timeliness of a petition for leave to intervene:

> (1) The length of time during which the would-be intervenor actually knew or should have known of this interest in the case before he petitioned for leave to intervene. United Airlines, Inc. v. McDonald, supra; SEC v. Tipco, Inc., 554 F.2d

710, 711 (5th Cir. 1977); McDonald v. E. J. Lavino Co., supra; Diaz v. Southern Drilling Corp., supra.

(2) The extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case. United Airlines, Inc. v. McDonald, supra; McDonald v. E. J. Lavino Co., supra; Diaz v. Southern Drilling Corp., supra.

(3) The extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied. Moten v. Bricklayers International Union, 543 F.2d at 228 (D.C. Cir. 1976); see, McDonald v. E. J. Lavino, supra; Diaz v. Southern Drilling Corp., supra.

(4) The existance of unusual circumstances militating either for or against a determination that the application is timely. NAACP v. New York, supra.

Appellants argue that intervention was not untimely in that they acted diligently to intervene once they became aware they might be adversely affected. (Appellants' Br. at p. 14). However, application of the

Stallworth criteria demonstrates that Judge Pointer did not abuse his discretion in holding that appellants' motion to intervene was not timely.

(1) The length of time during which the would-be intervenor actually knew or should have known of his interest in the case before he petitioned for leave to intervene.

With respect to the first factor Judge Pointer noted that at the time of the motion, this litigation had been pending for over five years and had been vigorously contested by the existing parties through two trials and one appeal. (R.I., 321).

Moreover, long before the contents of the proposed consent decrees were disclosed, appellants must have known their interests might be affected. Whether the litigation terminated in settlement or decision, it was apparent that in fashioning a remedy, the interests of non-minority employees seeking the same jobs might be affected. Numerous courts have held intervention untimely under similar circumstances. See, Commonwealth of Pa. v. Rizzo, 530 F.2d 501 (3d Cir. 1976); Culbreath v. Dukakis, 630 F.2d 15 (1st Cir. 1980); Stallworth v. Monsanto, supra; Dennison v. City of Los Angeles, 658 F.2d 694 (9th Cir. 1981); Alaniz v. Tillie Lewis Foods, 572 F.2d 657 (9th Cir. 1978); EEOC v. ET & WNC Transp. Co., 81 F.R.D. 371 (W.D. Tenn. 1978); Firebird Society, Inc. v. New Haven Board of Fire Commissioners, 66 F.R.D. 457 (D.Conn. 1975), aff'd 515 F.2d 504, cert. den. 423 U.S. 867 (1975).

In Commonwealth of Pa. v. Rizzo, supra, the Third Circuit Court of Appeals held that the trial court did not abuse its discretion when it ruled untimely the attempted F. R.Civ.P. 24(a)(2) intervention by the Fire Officers Union and white firefighters in an action challenging employment practices when the motion to intervene was filed after the entry of a final order. In Rizzo, as in this case, the white firefighters argued that, until shortly before they moved to intervene, they reasonably believed that their interests were being protected. Moreover, they claimed that their interests were not even implicated because they had understood that promotion practices were not at issue. In response to these arguments the Third Circuit noted that the white firefighters could not reasonably claim that they were unaware of the action and that the nature of the remedies sought by plaintiffs should have prompted intervention. Noting that the complaint, by its terms, addressed the whole spectrum of employment practices in the fire department and that extensive publicity about the litigation gave early notice of its potential impact on the firefighters rights, the Third Circuit found no abuse of discretion in the district court's denial of intervention.

Likewise, the First Circuit Court of Appeals in Culbreath v. Dukakis, supra, upheld the district court's denial of intervention. With respect to the length of time the intervenor knew or should have known of his interest before petitioning to intervene, the First Circuit held there was no excuse for the employee union's failure to intervene earlier in an employment discrimination action against the state nearly four years after they should have known of the initiation of the action and shortly before the

parties to the action agreed on a consent decree containing racial preference mechanisms. As the court stated,

> While knowledge of the suit is not necessarily knowledge of one's interest, in this instance, the existence of interest was obvious. See, Stallworth v. Monsanto Co., 558 F.2d at 264, and the only lack related to its extent, a matter of degree, not of kind. The complaint, the newspaper stories and the published court decisions all stated that the purpose of the suit was to force each agency to adopt hiring and promotion policies that would result in employed minorities and percentages approximately equal to their proportion of the population of the City of Boston. It should have been apparent to the unions that some non-minorities would be passed over in favor of minorities to achieve this goal.

Culbreath v. Dukakis, supra at p. 1592.

Thus, the First Circuit held that the trial judge had ample grounds for finding that the union should have known of their interest in the suit long before they filed their motion to intervene.

In Dennison v. City of Los Angeles, supra, the appellate court rejected the union's contention that it was not notified of the employees' action until shortly before the fairness hearing noting that the union had sufficient opportunity to intervene in the action prior to entry of the consent decree. Moreover, the court held that the union was provided with an opportunity to present to the trial court its view of the adverse impact on the decree of non-minority employees at the fairness hearing.

Finally, the Ninth Circuit in Alaniz v. Tillie Lewis Foods, supra, upheld the trial judge's denial of intervention under Rule 24(a) where the crux of the putative intervenor's argument was that they did not know that the settlement decree would be to their detriment. The court reasoned that surely the appellants knew the risk; therefore, they should have joined the negotiation before the suit was settled.

Contrary to the appellants' argument that they were not aware that "relief which could possibly be granted under Title VII could adversely affect them in greater degrees in the event the existing defendant decided to settle the case" (Appellants' Br. at p. 17), these cases establish that where there is no allegation that the litigation or its progress was fraudulently concealed from potential intervenors, the nature of the relief sought should have alerted potential intervenors to the necessity for intervention. The record does not suggest fraudulent concealment.

Likewise, appellants' claim, even if correct, that their intervention was timely because they relied on the Personnel Board to defend the action and resist imposition of hiring and promotional goals (Appellants' Br. at p. 13) does not succeed. As noted by the Fifth Circuit in U.S. v. U.S. Steel, supra at pp. 1235-36:

> [T]he Union's reliance was misplaced...Even were we to accept the union's argument as explaining the delay, prejudice to the parties would still persist because, as the union concedes, it was aware of the consent decree from the first yet slept on its rights and took no action to assert its interest.

A similar response was made by the Third Circuit in Commonwealth of Pa. v. Rizzo, supra, to the union and white firefighters assertion that they were "lulled into non-action" by misrepresentations that the city would vigorously defend the case. The Third Circuit noted that the burden of establishing inadequate representation was on the proposed intervenor.[2/] Thus, the court rejected the union's contention that intervention was timely and that any delay should be excused due to their reliance on misrepresentations concerning the adequacy and vigor of representation by the City of Philadelphia. See also, EEOC v. Westinghouse Elec. Corp., ___ F.2d ___, 28 FEP Cases 815 (8th Cir. 1982) (per curiam) (burden on intervenor to demonstrate lack of knowledge). Similarly, intervention by the Firefighters in this case is untimely and may not be excused because of their assertion that they were allegedly relying on the original defendants to defend their interest. Thus, on this basis the courts have held intervention untimely where it occurs in such latter stages of litigation.

Simply put, the Firefighters made an election to defend their interests by proxy. They cannot now complain because the result displeases them. Having sat on their hands for seven years, the Firefighters now have no right to contest the outcome of the fray.

2/ Furthermore, the court held that a presumption of adequate representation generally arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee. Commonwealth v. Rizzo, supra, at p. 283. See also, 7A C. Wright & A. Miller, Federal Practice and Procedure § 1209 at 528-29 (1972); Sam Fox Publishing Co. v. United States, 366 U.S. 683, 689 (196) (dictum).

(2) The extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenors' failure to apply.

It should be initially noted that consideration of the second factor is only relevant to permissive intervention under Section (b) of Rule 24.[3/]

Under Stallworth v. Monsanto Co., supra, the next relevant inquiry is "how much prejudice would result from the would-be intervenor's failure to request intervention as soon as he knew or should have known of his interest in the case." Id. at p. 267. As to the prejudice which the resultant delay might cause to other parties, the Third Circuit in Commonwealth v. Rizzo, supra, adopted the district court's opinion:

> To allow intervention at this stage of the case would result in serious prejudice to the rights of the plaintiffs and the Philadelphia Fire Department. Extensive discovery has been undertaken and completed, all critical issues have been resolved, and a final Order has been entered. The interest in basic fairness to the parties and expeditious administration of justice mandates the denial of the motion to intervene. Id. at p. 284.

Likewise, to permit intervention would result in further unfair and unjustified delays and possible denial of the relief which all the parties agreed to in

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3/ As noted by the court in Stallworth, since a similar provision is not included in Section (a) of the Rule providing for intervention of right, it is apparent that prejudice to the existing parties other than that caused by the would-be intervenor's failure to act promptly is not a factor meant to be considered where intervention is of right.

the settlement agreement. Firebird Society, Inc. v. New Haven Board of Fire Commissioners, supra; Culbreath v. Dukakis, supra; Commonwealth v. Rizzo, supra; Alaniz v. Tillie Lewis Foods, supra; U.S. v. Allegheny-Ludlum Industries, supra.

In this case, the Firefighters would compel Birmingham to continue to litigate a suit it has negotiated to conclusion. The parties here have waited approximately seven years since commencing suit for resolution of the issues. Likewise, the parties have bargained in good faith in the belief that ultimately they could economically and fairly resolve this potentially devisive lawsuit. However, belated intervention for the purpose of challenging the consent decree will jeopardize months of difficult negotiation, and postpone full implementation. Indeed, the Firefighters' objection, if followed through to its logical conclusion, would dictate that the City of Birmingham either confess judgment, abdicating any hope of limiting the financial impact and fashioning injunctive relief, or litigate to a conclusion, incurring staggering legal expenses with the unhappy prospect of paying both its own lawyers and the lawyers for potential prevailing private plaintiffs. Neither the Constitution nor any law requires such a dilemma. Indeed, the federal policy of encouraging voluntary resolution of employment discrimination litigation suggests that such a dilemma is not intended.

(3) Prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied.

With respect to the third factor, the essence of this requirement is "whether the union received such notice and opportunity to be heard as to satisfy the due process rights to be accorded persons so situated." Culbreath v. Dukakis, supra at p. 1593. See generally, Hansberry v. Lee, 311 U.S. 32, 43 (1940); NAACP v. New York, supra. Here the district court noted that it had reviewed the provisions of the proposed settlements to which objections had been raised and found the settlement to represent a fair, adequate and reasonable compromise of the issues between the parties. (R. J., 320). Moreover, the court stated that it not only permitted the Firefighters to be heard in opposition to the settlement but that it fully considered their objections. (R.I., 321). Thus, the prejudice to the intervenors from denial of intervention is minimal.

Likewise, despite appellants' contentions to the contrary (Appellants' Br. at p. 20) they were not denied an opportunity to be heard. Indeed, the Firefighters were allowed to present their arguments in opposition to the consent decree and based on its analysis of all the evidence, including the Firefighters' objections, the district court upheld the consent decrees. Thus, the appellants were not deprived of an opportunity to be heard as required by the due process clause. The Firefighters' suggestions that an evidentiary hearing was required to rule on its intervention petition is spurious in view of the consideration of their objections.

In Culbreath v. Dukakis, supra, the court similarly denied a motion to intervene on the ground that the intervenor's rights had been adequately represented in that the trial court had considered the potential objections, determined the settlement was fair, adequate and reasonable and not unlawful and that the plaintiffs enjoyed a substantial probability of success on the merits. Thus, the appeals court found that only a slight possibility of prejudice might flow to the union from a denial of intervention.

(4) The existence of unusual circumstances militating either for or against a determination that the application is timely.

With respect to the fourth factor regarding time limits, there are no unusual circumstances militating for intervention.

(5) Intervention was appropriately denied.

Analysis of the four factors which must be considered in passing on the timeliness of a motion to intervene indicates that the trial court did not abuse its discretion in denying intervention. The passage of many years from the time the union should have known of its interest in the case places a heavy burden on the union to make a strong showing justifying intervention. Moten v. Bricklayer's International Union, supra at p. 228; Commonwealth of Pa. v. Rizzo, supra at p. 501. The existing parties to the litigation have demonstrated they will suffer significant prejudice if inter-

vention is allowed at this late date, while the Firefighters have made no showing of substantial prejudice which is likely to result from denial of intervention. The trial court's decision to deny intervention has not been shown to have been an abuse of discretion.

II. THE FIREFIGHTERS DO NOT HAVE STANDING TO CONTEST CONSENT DECREE PROVISIONS WHICH DO NOT AFFECT THEIR MEMBERSHIP

The Firefighters lack standing to contest hiring goals and requirements. An association may obtain standing to seek judicial relief from injury to itself or as the representative of its members, even in the absence of injury to itself. Sierra Club v. Morton, 405 U.S. 727 (1972); Warth v. Seldin, 422 U.S. 490 (1975); Hunt v. Washington State Apple Adv. Comm., 432 U.S. 333 (1977). Obviously, the Firefighters lack standing with respect to the consent decrees effect on employees of other departments. U.S. v. City of Miami, 614 F.2d 1322 (5th Cir. 1980); aff'd in part and vacated and remanded in part, 664 F.2d 435, (5th Cir. 1981) (en banc). However, the Firefighters have also failed to assert any facts or averments demonstrating that it has standing in either capacity with respect to the provisions of the consent decree governing the hiring of both blacks and women for the fire department.

In Warth v. Seldin the Supreme Court established that in order to obtain standing as a representative of its members, an association must satisfy the following criteria:

> The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit . . . So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members . . .

422 U.S. at p. 511.

Based on these criteria the Firefighters' union has failed to demonstrate that it has standing to assert the rights of its members. Although the Firefighters object to entry level requirements and hiring goals, obviously the Firefighters lack standing with respect to entry level jobs in that the union's members are already employees of the city. Furthermore, with respect to the promotional goals the Firefighters fail to show a sufficient direct and personal injury to its members. To the extent blacks belong to the Firefighters union, there are likely antagonistic interests in any event.

Likewise, with respect to the union's standing on its own behalf, it has alleged no facts indicating how the union has suffered, or will suffer, any injury in fact. The Supreme Court in Sierra Club stated that " 'A mere interest in a problem', no matter how long standing the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' ". Sierra Club, 405 U.S. 739. The Firefighters simply have failed to meet that standard by demonstrating a sufficiently direct injury to confer standing. As noted infra, the Firefighters' Association has no contractual rights to

protect; thus, the Firefighters situation is distinguishable from that of the unions in City of Miami, supra; and EEOC v. AT&T, supra, who were held to have standing because of the effect of affirmative action provisions in the consent decrees on contractual seniority provisions. Furthermore, as one trial court observed:

> Where, as here, however, both those promoted and those "passed over" are members of the Union, it is difficult to say with certainty that the Union has the personal stake and interest sufficient to assure that concrete adverseness required by Article VII of the Constitution.

Germann v. Kipp, 14 F.E.P. Cases 1197, 1200 (W.D. Mo. 1977).

The appellant organization, therefore, fails to meet the requirement that a party seeking review must allege facts showing that he has been adversely affected.

III. IN ALABAMA PUBLIC EMPLOYEES DO NOT HAVE COLLECTIVE BARGAINING RIGHTS AND, ACCORDINGLY, THE FIREFIGHTERS HAVE NO RIGHTS AFFECTED BY THE CONSENT DECREES

Under Alabama law a public employer cannot enter into a valid labor contract with a labor organization concerning wages, hours, and conditions of employment in the absence of express constitutional or statutory authority to do so. Nichols v. Bolding, 291 Ala. 50, 277 So. 2d 868, (1973); Int'l Union of Operating Engineers v. Water Works Board, 276 Ala. 462, 163 So. 2d 619 (1964). There is no Alabama statute authorizing public

employers to contract with a labor organization. In 1977 the Legislature of Alabama enacted Code of Alabama, 1975, § 11-43-143 which provides:

> (a) No person shall accept or hold any commission or employment as a fire fighter or fireman in the service of the state or of any municipality in the state who participates in any strike or asserts the right to strike against the state or any municipality of the state, or be a member of an organization of employees that asserts the right to strike against the state or any municipality in the state knowing that such organization asserts such right.
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> (b) All fire fighters serving the state or any municipality in the state either as paid firemen or as volunter fire fighters who comply with the provisions of this section are assured the right and freedom of association, self-organization and the right to join or to continue as members of any employee or labor organization which complies with this section, and shall have the right to present proposals relative to salaries and other conditions of employment by representatives of their own choosing. No such person shall be discharged or discriminated against because of his exercise of such right, nor shall any person or group of persons, directly or indirectly, by intimidation or coercion compel or attempt to compel any fire fighter or fireman to join or refrain from joining a labor organization. (Acts 1967, No. 229, p. 598.)

Thus, although the law of Alabama does not limit the right of firefighters to organize labor unions and present proposals relative to salaries and other conditions of employment, the Supreme Court of Alabama in Nichols v. Bolding, supra at p. 56, held that there is nothing in the statute which would indicate that the Legislature intended to require public officials to negotiate with the Firefighters' union or that the Legislature intended to grant public employees collective bargaining rights. Indeed, appellants concede that, "In Alabama, public employees do not have collective bargaining rights." [Appellants' Br. at p. 37] Thus, the Firefighters acknowledge that

by virtue of law, public employees in Alabama cannot enter into a labor contract.

Furthermore, the numerous cases relied on by the appellants with respect to limitations on quotas and goals are inapplicable. As none of the subjects of the proposed consent decree was a matter of contract with the union, the union here does not occupy the same position as was the case in U.S. v. City of Miami which speaks only to the propriety of goals and quotas in the context of the non-concurrence of a union which was a party to the litigation and had a collective bargaining agreement. The absence of impaired contractual rights, therefore, provides an unambiguous distinction between this case and City of Miami 664 F.2d at 447 (... "we are not prepared to hold that the consent decree is valid insofar as it deprives the FOP and its members of the benefit of the promotion procedure that was in effect a part of the FOP contract with the City.").[4/] Rather, U. S. v. City

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4/ In his opinion below, Judge Pointer correctly noted in response to the Firefighters' contention that after City of Miami no changes in the Civil Service rules should be approved without its consent as a union: "The point however is that -- unlike the situation in the City of Miami case -- none of the rules to be altered under the proposed consent is a matter of contract with the union. Rather, the case of sub judice is like that involved in the City of Alexandria, a decision left intact when rehearing was granted in the City of Miami decision one may reasonably assume that en banc rehearing was granted to reconsider the consequences upon a proposed settlement of non-concurrence of a union which was party to collective bargain rules and not for the purpose of reconsidering the basic rules governing judicial approval of proposed settlements." (R.I, 319)

of Alexandria, 614 F.2d 1358 (5th Cir. 1980) controls the present litigation. The Fifth Circuit's Miami analysis on rehearing focused on the fact that the consent decree involved affected the F.O.P.'s contract with the city and that under Florida law, when a subject is encompassed within the terms of existing contract, a public employer may not foreclose bargaining on the subject or unilaterally alter the terms and conditions of employment. Thus, City of Miami is inapposite to this appeal and does not govern the judicial approval of proposed settlements in contexts other than that of a proposed consent decree which affects matters of contract with a union with a collective bargaining agreement.

No collective bargaining rights of the Firefighters are affected by the challenged decrees under Alabama law. Therefore, proposed intervenors do not possess contractual rights as were abridged in City of Miami thus requiring union participation in that case. Therefore, the applicable standard governing judicial approval of proposed settlements is that established in City of Alexandria.[5/]

5/ Furthermore, it should be noted that under Bonner v. Pritchard, 661 F.2d 1206 (11th Cir. 1981) the en banc decision in City of Miami is not binding as precedent on the Eleventh Circuit, in that the Eleventh Circuit stated in Bonner that decisions of the Fifth Circuit as that court existed on September 30, 1981, handed down by that court prior to close of business on that date, would be binding as precedent on the Eleventh Circuit, but the court reserved for future consideration the effect on Eleventh Circuit law of decisions handed down by the former Fifth after September 30, 1981 in cases submitted to that court for decesion before October 1 and possible future en banc decisions by the old Fifth changing what appeared to have been its rule as of September 30, 1981. As the City of Miami en banc decision was not handed down until December 3, 1981, it falls into this latter category of cases.

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IV. THE ADOPTION OF HIRING AND PROMOTION GOALS IS PROPER IN THIS CASE

In opposing the proposed goals, the Firefighters rely heavily on their assertion that the plaintiffs failed to prove a prima facie case of violation of Title VII. Second, the union stresses that the city denied the allegations of employment discrimination. Therefore, the union concludes that this case was one in which discrimination on the basis of race or sex has not yet been established. (Appellants' Br. at pp. 9, 32) These arguments, however, do not impugn the propriety of the trial court's approval of consent decrees. The scope, and necessity of a non-admission clause is clear in the consent decree context. As Judge Goldberg noted in analyzing a similar consent decree provision:

> We interpret the disclaimer of any discrimination and the proposed consent to be, in effect, a reservation of the right to contest the allegation of legal discrimination in any suit for additional relief, either by the government or by a private plaintiff. Such disclaimer is standard in many consent decrees. . .and is insisted upon by many defendants for the obvious reason that they do not wish unnecessarily to open themselves up to large back pay awards. In the context of consent decrees providing affirmative action relief, we interpret the disclaimer to be an admission that there is a statistical disparity which the defendants cannot unequivocally explain, together with the reservation of the right to attempt to explain it at any other time.

City of Alexandria, supra at p. 1365 n.15. Thus, the City's denial of allegations of discrimination in the consent decrees does not support the Union's conclusion that this case is one in which discrimination on the basis

of race or sex has not been established. See also, the panel decision in City of Miami, 614 F. at p. 1337 (construing Regents of the University of California v. Bakke, 438 U.S. 263 (1978) as not mandating specific finding of past discrimination as a predicate for basing employment decisions on race). Other circuit courts have also approved race-conscious remedies without prior judicial findings of racial discrimination. Talbert v. City of Richmond, 648 F.2d 925, 928 (4th Cir. 1981); Detroit Police Officer's Ass'n v. Young, 608 F.2d 671, 690; 694 (6th Cir. 1979), cert. den. 69 U.S. 951.

Referring to his findings in the first trial, which established that blacks were discriminated against by tests used by the Personnel Board to screen and rank applicants for jobs as firefighters and the evidence presented at the second trial, Judge Pointer noted that a natural consequence of such discrimination against blacks at entry-level positions in the fire department would be to limit their opportunities for promotion to higher levels in the department. Moreover, statistics for the fire department as of July 21, 1981, indicate that obvious racial and gender disparities existed. Of the 453 firefighters 42 were black and none of the 140 lieutenants, captains and batallian chiefs were black. (Pl. Ex. 3 Fairness hearing; R.I., 317).

Although no finding of discrimination on the basis of sex was made, the evidence also indicated that as of July 21, 1981, none of the 453 firefighters and none of the 140 lieutentants and captains, and batallian chiefs in the fire department were female. The eight female employees of the 630 employees in the fire department were all assigned to office and clerical positions. (Pl. Ex. 1, Fairness Hearing; R.I., 318) Under the circumstances, the consent decree appropriately provided more aggressive affirmative relief to remedy those obvious racial and gender imbalances, which may be presumed to exist by reason of prior discriminatory employment practices.

The only provisions of the consent decree which the Firefighters attack are those which impose hiring and promotional goals in the fire department. In the City of Alexandria, supra at p. 1363, Judge Goldberg observed:

> [I] n the context of the suits brought by the Federal Government against municipalities alleging violations of Title VII, goals and targets are acceptable under the Constitution of the United States so long as they are reasonably related to the legitimate state goal of achieving equality of employment opportunity.

Despite the Firefighters' contention that the "vacating of the first Miami opinion leaves the Alexandria opinion, insofar as its finding of legality of quotas, nothing more than a judgment in an isolated case without preceden-

tial value" (Appellants' Br. at 25), the decision in City of Alexandria was left intact when rehearing was granted in the City of Miami decision. Therefore, the Fifth Circuit's decision in the City of Alexandria which upheld the use of goals for governmental employers in the context of a settlement decree remains law in this circuit. The City of Miami decision only governs those situations where goals adopted for public employers in a settlement decree affect the collective bargaining rights of a union.

Other circuits have likewise upheld the use of goals with respect to governmental, as well as non-governmental employers, noting that federal district courts are granted broad discretion to shape relief. See Detroit Police Officers Ass'n v. Young, supra; Valentine v. Smith, 654 F.2d 503 (8th Cir. 1981); Setser v. Novack Investment Co., 657 F.2d 962 (8th Cir. 1981) (en banc); Local Union No. 35 v. City of Hartford, 625 F.2d 416 (2d Cir. 1980); Cf. Talbert v. City of Richmond, supra. Also, see pre-Bakke cases cited in the City of Miami panel opinion, 614 F.2d at pp. 1335-36. Further support for the voluntary adoption of goals is found in United Steelworkers of America v. Weber, 443 U.S. 193 (1979), 563 F.2d 216 (5th Cir. 1977) in which the Supreme Court upheld the voluntary adoption by a private employer of a quota based affirmative action plan even though (i) the quotas in the plan would benefit persons who had never been discriminated against by the employer and (ii) there had been no finding of any discrimination by that employer.

Appellants embrace Sledge v. J. P. Stevens & Co., Inc., 585 F.2d 625, 643 (4th Cir. 1978), cert. denied, 440 U.S. 981 (1979) as a limitation upon the circumstances in which affirmative action may be utilized, particularly in the public sector (Appellants' Br. at 27-28). Recently, however, the Fourth Circuit, in holding that a district court did not abuse its discretion in ordering the use of affirmative action, stated:

> In light of this district court's broad discretion and its duty to accord complete relief, we conclude that the district court did not abuse its discretion in ordering the injunctive relief challenged here. In reaching that conclusion, we are mindful of our opinion in Sledge v. J. P. Stevens & Co., Inc., in which we indicated that hiring and promotion quotas should be made an element of a remedial decree in a Title VII case only under limited and compelling circumstances 585 F.2d at 646, 649. Both the short and long-term hiring and promotion quotas reviewed by the court and found to be inappropriate in that case were strict and mandatory. See id. at 644-45. In our case, however, only the long-term goal is mandatory, that goal being "to insure that blacks are represented in nonbargaining unit jobs, level 7 and above, at a ratio not more than the ratio of blacks in the top work force of USPS in Mecklenburg county." No specific date has been set for the achievement of that goal. The district court did set a three year interim schedule for USPS to follow to achieve its ultimate goal, but the court was careful to define the goals for those years as a "framework" to follow and not "rigid quota[s]." Thus, there is a certain flexibility in the goals in our case that was lacking in Sledge.
>
> Even if the distinction between "goal" and "quota" is merely one of semantics, see id. at 644 n.29, we think the circumstances of this case warrant the application of the goals imposed by the district court. Unlike the situation in Sledge, it is clear on the face of the record in this case that USPS's racial discrimination was "egregious, purposive, or blatant," see id. at 647, and that it has persisted for a substantial period at time, see Guardians Association of New York City Police

> Department, Inc. v. Civil Service Commission, 630 F.2d 79, 102, 23 FEP Cases 909 (2d Cir. 1980); either of those descriptions, standing alone, has been recognized as an indication of compelling circumstances. See id. at 109; Sledge v. J. P. Stevens & Co., Inc., 585 F.2d 625, 647, 18 FEP Cases 261 (4th Cir. 1978). The district court found that USPS had discriminated against black employees up until the eve of trial and that any progress that USPS made to alleviate its discrimination in promotion was brought about by the pressure of this lawsuit rather than by any real change in USPS's practices.
>
> We are thus convinced that the goals imposed here are necessary to ensure that USPS's prior and present practices of discrimination be eliminated. Accordingly, we conclude that the disctrict court acted well within its discretion in setting the goals and in fashioning the relief granted.

Chisolm v. U.S. Postal Service, 665 F.2d 482, 499 (4th Cir. 1981).

Likewise, in Talbert v. City of Richmond, supra, the Fourth Circuit upheld the city's promotion of a black officer with a lower test score than a white police officer and the city's consideration of race as a relevant factor. Thus, appellants' reliance on Sledge is discredited because the Fourth Circuit has since upheld the use of affirmative action goals as necessary to eliminate past and present discrimination in the public sector.

In the Valentine decision, the Eighth Circuit formulated the following test for approval of affirmative action standards:

> A race-conscious affirmative action program is substantially related to remedying past discrimination if (1) its implementation results or is designed to result in the hiring of a sufficient number of minority applicants so that the racial balance of the employer's work force approximates roughly, but does not unreasonably exceed, the balance that would have been achieved absent the past discrimination; (2) the plan endures only so long as is reasonably necessary to achieve its

> legitimate goal; (3) the plan does not result in hiring unqualified applicants; and (4) the plan does not completely bar whites from all vacancies or otherwise unnecessarily or invidiously trammel their interest.

Valentine v. Smith, Interim President of Arkansas State University, supra at p. 510. Judged by these four criteria, which Judge Pointer addressed, the proposed affirmative relief in this case is certainly lawful.

First, the goals under attack provide: (1) the Personnel Board will certify black applicants for entry-level positions as firefighters as earlier directed by the trial court in the first trial and as affirmed by the Fifth Circuit, i.e., basically at a rate commensurate with the relative percentage of black applicants (R. I, Document 60, Exhibit 2, p. 4); (2) the Board will attempt to certify females for these entry level positions at a rate commensurate with the relative percentage of female applicants or, if higher, at the rate of one female to nine males for firefighters (R. I, Document 60, Exhibit 2, p. 7); (3) the Board will attempt to certify black and female candidates for higher level positions in the fire department in a manner that will permit the city to attain its own goals and, where necessary for this purpose, can certify more than the top three candidates found eligible by it (R. I, Document 60, Exhibit 2, p. 9); (4) subject to the availability of qualified candidates, the city agrees to hire into these entry-level positions blacks and women at a rate commensurate with the percentage of black and female applicants or, if higher, at the rate of one black to one white and at the approximate rate of one woman to six men for

firefighter (R. I, Document 60, Exhibit 2, pp. 5, 9); (5) subject to the availability of qualified candidates, the city agrees to promote blacks to fire lieutenant at the rate of one black to one white, and to promote a black to one of the next two fire captain vacancies, and to promote blacks to subsequent vacancies in the higher level positions in the departments at twice the percentage of blacks in the positions in which promotions are traditionally made. (R.I, Document 60, Exhibit 2, pp. 6,7). Thus, the provisions of the consent decree were designed merely to result in the hiring of a sufficient number of minority applicants so that the racial balance of the fire department approximated the balance that would have been achieved absent application of past employment practices. Moreover, the Supreme Court has observed:

> Absent explanation, it is ordinarily expected that non-discriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). Thus, the selection of long-term goal, predicated upon the civilian work force, is readily supported.

Second, the affirmative action provisions in the consent decree are limited both in time and effect. They are only to remain in effect until the percentage of blacks and women in a particular job approximates the percentage of blacks or women, respectively, in the civilian work force

in Jefferson County, Alabama. Furthermore, the settlement provides that after a period of six (6) years the decrees will be dissolved. Thus the decrees do not establish permanent preferences for blacks and women.

With respect to the third factor in Valentine, the provisions of the decree expressly provide that the settlements provisions are not to be interpreted as requiring the hiring or promotion of a person who is not qualified or of a person who is demonstrably less qualified according to a job-related selection procedures. The Firefighters' argument is predicated on the unfounded inference that the establishment of goals is an abdication of qualifications. The implicit assumption -- although formally denied — is that blacks and women make poorer firefighters than whites and males. However, the precise language of the decree provides:

> Nothing herein shall be interpreted as requiring the city to hire unnecessary personnel or to hire, transfer, or promote a person who is not qualified, or to hire, transfer or promote a less qualified person in preference to a person who is demonstrably better qualified based upon the results of a job related selection procedure. (R.I, Document 60, Exhibit 2, p. 3).

None of the parties to these decrees is interested in undermining the efficiency of the Birmingham Fire Department. Birmingham suspects that the certification examinations, coupled with the award of seniority credits in promotion cases, may not precisely predict relative qualification of competing candidates. Nonetheless, the City has no interest in impairing

the operation of its Fire Department and does not intend to hire or promote incompetents.

Finally, the proposed decrees do not preclude the hiring or promotion of whites or males. As noted by Judge Pointer,

> Study of these provisions indicates that, while comprehensive, they nonetheless preserve substantial opportunity for whites and males to be hired or promoted.

Thus, the four criteria for approval of affirmative action provisions which were established in Valentine v. Smith, supra, are clearly met in the present case.

Without question, this Court is entitled to reach the conclusion of the Fifth Circuit in the City of Alexandria:

> The proposed decree established long term goals of achieving an all job classifications the same percentage of blacks and women as are present in the work forces in the various effected localities. In the interim, goals ranging from 15% to 50% blacks or women were set for the filling of vacancies within the departments. we cannot say that these goals are oppressive to whites or males, or are against public policy; nor does anything appear which would make us believe that they are illegal or unconstitutional.

614 F.2d at 1362.

CONCLUSION

The district court's final judgment approving the consent decrees and its judgment denying the motion to intervene filed by the Firefighters Association, Gray and Sullivan are due to be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Brief to the following persons by depositing a copy of the same addressed to them, first class postage prepaid, in the United States mail:

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This the 26th day of April, 1982.

An Attorney for Appellee
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Mr. FITZPATRICK. Thank you, Mr. Chairman.

The 11th Circuit held that intervention was not necessary because individual firefighters who were denied promotion should be entitled to file separate suits. We did file those suits and pursue them, but in 1984 the District Court summarily deemed its decree valid well before trial and bound the nonminority firefighters to the terms of a decree they had no part in making. The U.S. Supreme Court simply held that this was wrong and said they were entitled to a trial on the validity of the affirmative action decree, one which we have never had. Despite 9 years of litigation, that opportunity has only now been afforded, and we urge that Congress not take away that right.

Let me comment substantively on the bill just briefly, if I may, Mr. Chairman. First, the provisions governing the hearing of objections in part A of section 6 are violative of due process. A fairness hearing does not provide adequate protection to nonparties. Nonparties lack the tools of discovery to prepare for a hearing, have no subpoena power or other rights of parties, and most important, have no right to appeal when the District Court signs the consent decree. An objector is not a party and does not have the rights of a party, and the bill does not provide the rights of parties to those who are being kept out of court when a consent decree is entered.

Second, the notice provisions of parts B and C also do not meet due process requirements. The court has upheld the termination of nonparty claims only in very limited statutory proceedings where there is a clear framework of rules to require actual notice to affected individuals with a full complement of due process guarantees. There are no guidelines regarding notice in this bill which even attempt to meet due process standards to ensure actual notice to affected individuals. The language of the bill which cuts off claims without service of actual notice on known interested parties is contrary to the U.S. Supreme Court's recent due process decision of *Tulsa Professional Collection Services* v. *Pope*.

I should note that even the kind of notice which may meet due process requirements in bankruptcy or probate proceedings may not pass muster when fundamental personal rights are at stake. In an employment discrimination case, the right to equal protection of the laws and the right to be free of invidious discrimination are at stake.

Third, while terminating the rights of nonparties to seek court review of their claims when harmed by the implementation of a decree, the bill makes it clear that the standards of intervention remain unchanged. In other words, intervention applications at the time of approval of a decree will be met with claims of untimeliness and lack of standing. That was demonstrated by the facts of the Birmingham case, where we attempted to intervene, and we were shut out of court; they said we were 5 years too late.

Fourth, the inconsistency and unfairness of the bill, is also demonstrated by part (2)(B) of section 6. While nonparties who are usually nonminorities are precluded from ever having a meaningful day in court, the bill expressly preserves the rights of the beneficiaries of the decree, usually minorities or women, to seek further or additional relief in other proceedings against the employer that is a party to the decree.

Fifth, this bill will not reduce litigation. Rather, it will cause a proliferation of unnecessary motions to intervene by persons who might never have a stake in the litigation at great cost to them. Under this bill, every time an employer is sued under title VII, the employees of that employer as well as the prospective employees of that employer must intervene in order to preserve their right to contest a decree which might possibly affect their rights in the future.

The U.S. Supreme Court in *Martin* v. *Wilks* recognized that the existing rules provide a framework to allow parties to negotiate consent decrees yet ensure finality. And as pointed out in my written statement, rule 19 requires joinder of interested parties; rule 23 provides a mechanism to bring in large groups of persons.

We believe that racial discrimination should be identified and eliminated and the victims be given a full remedy, but not one that infringes on the rights of innocent third parties.

Finally, Mr. Chairman, this bill is not content with just prospective application. Under its transition rules, it seeks to throw any employment discrimination case involving a prior decree out of court on a retroactive basis.

Given the efforts of the Birmingham firefighters to intervene before entry of the decree, this would be extremely unfair. This committee should understand that in our multiethnic society, a decree which gives preferential relief may at the same time adversely impact upon other minorities and females. While we believe this bill is primarily aimed at white males, it will also cut off the rights of Hispanics, women and other minorities.

Mr. Chairman, thank you for this opportunity.

The CHAIRMAN. Thank you very much.

[The prepared statement of Mr. Fitzpatrick follows:]

PREPARED STATEMENT OF RAYMOND P. FITZPATRICK, JR.

Mr. Chairman, I am Raymond Fitzpatrick of Birmingham, Alabama. I represent the nonminority firefighters of the Birmingham Fire & Rescue Service in Martin v. Wilks. Thank you for the opportunity to appear before this Committee to comment on Section 6 of S.2104.

Martin v. Wilks was a correct decision which Congress should leave undisturbed. The Supreme Court reaffirmed the fundamental principle of due process that all Americans are entitled to a day in Court when they believe they have been wronged. I wish to make it clear that Martin v. Wilks is a decision designed to further the due process guaranties embodied in the Constitution, and any legislative action in this area must meet due process scrutiny. Those who claim that the Supreme Court was merely interpreting the Rules of Civil Procedure are wrong. The Supreme Court quoted Justice Brandeis when it held:

> it is a principle of general application in anglo-American jurisprudence that one is not bound by a judgment . . . in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.

The Court recognized that this fundamental due process principle was incorporated into the Rules of Civil Procedure by the permissive language of Rule 24 governing intervention and the mandatory joinder provisions of Rule 24. It is a principle which,

both as a matter of due process and fundamental fairness, Congress should not disturb.

The fairness of this principle is demonstrated by the facts of the Birmingham litigation where the nonminority firefighters filed both lawsuits challenging the quota plan and a motion to intervene in the consent decree litigation. In 1975, the United States filed suit against the City of Birmingham and the Personnel Board, a separate agency which screens applicants for City jobs. The Personnel Board's entry-level Police Officer and Firefighter examinations were found to violate Title VII, but not the Constitution, and the District Court ordered a hiring quota. The City of Birmingham was not found guilty of any discrimination. Nobody has ever challenged that entry level order. In 1979, the District Court held a second trial on the legality of other tests and screening devices used by the Personnel Board. There was no attack made on any Fire Department promotional examination. The City faced a potential backpay claim of $5 million. Rather than wait for a ruling, in 1981, the City secretly negotiated a Consent Decree in which it agreed to 50% quotas for promotions to Fire Lieutenant, quotas for all other jobs with the City of Birmingham, and paid only $265,000 to the victims of past discrimination. Mayor Arrington has described this arrangement as the "best business deal" the City had ever made.[1] Indeed it was, for the

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[1] 1985 trial, PX 403

City settled the case on the backs of innocent nonparties who themselves were not guilty of committing any discrimination.

The Birmingham Firefighters Association appeared at the District Court's Fairness Hearing to oppose the quotas and urge the Court to require participation by the nonminority employees in the settlement process. In addition, before approval of the decree,[2] the Firefighters Association and two of its members moved to intervene so they could contest the legality of the proposed decree. At the urging of the Lawyers Committee and the City of Birmingham, the District Court refused to allow intervention, claiming we were five years too late.

The Firefighters appealed. Again, the City and Lawyers Committee opposed intervention saying the firefighters were years too late, should have intervened when the suits were filed in 1975, and had no standing to contest the quotas because there had been no injury. In addition, the Lawyers Committee told the 11th Circuit that the Firefighters should not be allowed to intervene, because they were free to file separate litigation to challenge the City's actions.[3] The Eleventh Circuit held that intervention was not necessary because individual firefighters who are denied promotion should file separate suits after they are in fact denied

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[2] Intervention was sought on August 4, 1981. The decree was entered on August 21, 1981.

[3] Brief of John W. Martin, et al., Appellees at 10, No. 81-7761 (11th Cir. 1982).

a promotion.[4] Following the 11th Circuit's decision, my clients pursued their suits under Title VII and the Fourteenth Amendment. The District Court summarily deemed its decree valid and bound the nonminority firefighters to the terms of the Consent Decree they had no part in making. The District Court required the employees to show that the City was not following the decree. We again appealed and the 11th Circuit[5] and the Supreme Court[6] held that it was wrong to bind my clients to a settlement they had no part in making. The Supreme Court remanded the case for a trial on the validity of the City's race-based affirmative action plan.

Despite nine years of litigation, my clients have only now been afforded an opportunity to demonstrate that the City's quota plan is outside the limits of permissible affirmative action. I urge the Committee to leave that decision intact and wish to make the following substantive comments regarding this bill.

Section 6 has a number of problems which I wish to outline for the Committee:

1. The provisions governing the hearing of objections in part (A) of section 6 are violative of due process. A Fairness Hearing does not provide adequate protection to nonparties. Nonparties lack the tools of discovery to prepare for a hearing, have no

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[4] United States v. Jefferson County, 720 F.2d 1511 (11th Cir. 1983).

[5] In re Birmingham Reverse Discrimination Employment Litigation, 833 F.2d 1492 (11th Cir. 1987).

[6] Martin v. Wilks, 490 U.S. _____, 104 L.Ed.2d 835, 109 S.Ct. 2180 (1989).

subpoena power or other rights of parties and, most important, have no right to appeal when the district court signs the consent decree. An objector is not a party and does not have the rights of a party.[7]

2. The notice provisions of parts B and C also do not meet due process requirements. The Court has upheld the termination of nonparty claims only in very limited statutory proceedings, such as bankruptcy or probate proceedings, where there is a clear framework of rules to require actual notice to affected individuals, with a full complement of due process guaranties. There are no guidelines regarding notice in this bill which even

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[7] A fairness hearing does not provide nonparty objectors with an adequate opportunity to be heard. See, Comment, Collateral Attacks on Employment Discrimination consent decrees, 53 Chi.L.Rev. 147, 181 n.139 (1986) (use of a Fairness Hearing to dispose of nonminority claims is the most extreme view). The fairness hearing held in this case by the district court did not provide objecting parties with the benefits normally accorded to parties in litigation. Thus, the objectors were not able to engage in discovery, could not call witnesses or offer evidence, and, most importantly, could not appeal from the proceedings of the district court. Indeed, despite over nine years of continuous litigation, no appellate court has ever addressed the validity of Birmingham's plan, either on its face or as it applies to the firefighters.

The fairness hearing process, whereby nonparties are given the opportunity to voice their concerns through objections, does not rise to the level of the full hearing necessary to terminate the substantive rights of nonparties. Rather, a fairness hearing is much like the predeprivation conference in Cleveland Bd. of Education v. Loudermill, 470 U.S. 532 (1985) where the charged employee is given the right to appear before the decisionmaker to coax, object and respond to the proposed deprivation, but not call witnesses or cross-examine those of the employer. Indeed, Loudermill provided that after a deprivation the employee is entitled to a full hearing. Employees who are denied a promotion on the basis of race are certainly entitled to no less. The firefighters' suits are akin to the full post deprivation hearing required by Loudermill.

attempt to meet due process standards to ensure actual notice to affected individuals. The language of the bill which cuts off claims without service of actual notice on known interested parties is contrary to the Supreme Court's recent due process decision of Tulsa Professional Collection Services v. Pope, 108 S.Ct. 134 (1988).[8]

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[8] The practical effect of the doctrine of mandatory intervention is that parties to a consent decree may obtain a consent judgment from a court and make that judgment binding against all third parties. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 317 (1950) requires that in such circumstances, interested parties are entitled to the "best notice practicable." If a person's identity and whereabouts are known, the party seeking to bind another must mail or personally serve specific notice of the action. Mullane, 317-318.

In Mullane, the Court struck down a state statute permitting notice by publication to known beneficiaries in a proceeding for judicial settlement of trust accounts despite the fact that the trustee knew their identities and addresses. It made no difference that Mullane received actual notice of the proceeding and represented the interests of known beneficiaries. The Court held, at a minimum, individual notice by mail was required to be given to known interested parties. Mullane, 318-320.

In Tulsa Professional Collection Services v. Pope, 108 S.Ct. 1340 (1988), the Court again upheld the duty to give adequate notice by mail to known interested parties. The Tulsa Court struck down an Oklahoma statute permitting notice by publication to known creditors in a state probate proceeding. The Oklahoma statute permitted notice by publication for 2 consecutive weeks in a local newspaper. The publication commenced after the state probate court opened the estate upon request of the executor or administrator of the estate. The Court found that when private parties trigger a state statute of limitations through commencement of judicial proceedings there is sufficient state action to implicate the Due Process Clause. In such circumstances, "due process is directly implicated and actual notice generally is required." 99 L.Ed.2d at 577. The party giving such actual notice bears the burden of "reasonably diligent efforts . . . to uncover the identities . . ." of those interested parties that are "reasonably ascertainable. . . ." Id. at 578. The Court held that if the interested nonparties "identity was known or 'reasonably ascertainable,' then termination of appellant's claim without actual notice violated due process." Id. at 579.

I should note that even the kind of notice which may meet due process requirements in bankruptcy or probate proceedings may not pass muster when fundamental personal rights are at stake. In the bankruptcy and probate proceedings rights to a res-personal or real property - must be affixed. Title to property must be clear. In an employment discrimination case, the right to equal protection of the laws and the right to be free of invidious discrimination are at stake.

I wish to stress that even if mandatory intervention might be someday found constitutional in employment discrimination cases, it would not be the fairest or most efficient manner of adjudicating those rights for the reasons stated in Martin v. Wilks.

3. While terminating the right of nonparties to seek court review of their claims when harmed by the implementation of a decree, the bill makes it clear that the standards of intervention remain unchanged. In other words, intervention applications at the time of approval of a decree will be met with claims of untimeliness and lack of standing. As demonstrated by the facts

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The notice must be sufficient to apprise nonparties of the nature of the decree-approval proceedings, the effect of failure to seek intervention, and the time limit for motions to intervention. Comment, Collateral Attacks On Employment Discrimination Consent Decree, 53 Chi.L.Rev. 147, 160-161 (1986). Adequate notice must apprise the potentially affected nonparty of the procedure for resolving claims at a hearing so as to permit the objector to adequately prepare for the hearing. Memphis Light, Water and Gas Division v. Craft, 436 U.S. 1, 13-15 (1978).

of the Birmingham case, by the time a consent decree is announced, intervention is no option at all.

4. The inconsistency and unfairness of the bill is also demonstrated in part (2)(B) of section 6. While nonparties, who are usually nonminorities, are precluded from ever having a meaningful day in Court, the bill expressly preserves the rights of the beneficiaries of the decree, usually minorities or women, to seek further or additional relief in other proceedings against the employer that is a party to the decree.

5. This bill will not reduce litigation, rather it will cause a proliferation of unnecessary motions to intervene by persons who might never have a stake in the litigation at great cost to them. Under this bill, every time an employer is sued under Title VII, the employees of that employer, as well as the prospective employees of that employer, must intervene to preserve their right to contest a decree which might possibly affect their rights if they seek a promotion in the future.[9]

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[9] The questionable standing of nonminority individuals to participate and their uncertainty about whether they need to bear the expenses of litigating mean that third parties will often discover that their rights have been compromised but that it is already too late to move to intervene. The proponents of the bill claim a collateral attack bar saves judicial resources and litigation costs. On the contrary, such a rule will encourage protective and often unnecessary intervention applications which will unduly expand the breadth of discrimination litigation. In fact, under such a rule, every employee of every employer sued for race discrimination may be placed in the position of having to hire counsel to intervene to protect his or her position in the workforce. Such a burden has never been placed on strangers to litigation. See, Chase National Bank v. Norwalk, 291 U.S. 431, 441 (1933) ("law does not impose . . . the burden of voluntary intervention"). See also, Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867 (1984) (individual unlitigated claims of

class members not precluded despite the fact that other class members intervened to assert individual claims).

In order to have standing, a party must have a recognizable interest which is traceable to the defendant's allegedly unlawful conduct. Allen v. Wright, 468 U.S. 737 (1984); Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979). The rules of Article III standing apply to intervenors as well as original parties to the litigation. Diamond v. Charles, 476 U.S. 54 (1986).

The City of Birmingham has some 3,000 employees. Over 600 are Birmingham Fire & Rescue Service ("BFRS") employees. It is wholly unrealistic to require each individual BFRS employee to take notice in 1975 through newspaper stories of the pendency of litigation, to learn that the litigation involves rights to promotional positions rather than hiring discrimination, to foresee that their employer will settle rather than litigate and that they will be the ones to bear the burden of that settlement through implementation of the quotas. Such an individual's interest in the litigation would certainly be speculative at best.

Similarly, in 1981, it was unreasonable to require hundreds of BFRS employees to seek to intervene in order to protect their right to a promotion which they might decide to seek in the future and which might be denied if they obtain a score high enough to be certified. Moreover, only a small portion of those passing the Fire Lieutenant's examination are ever certified.

The union also cannot act as the surrogate for the employees. It represents a broad spectrum of employees, black and white, officers and privates, those with seniority and those without, as well as those who intend to seek promotion and those who do not. See, Wygant, 476 U.S. at 281 n.8.

Given the speculative nature in 1975 of the Firefighters' interest in the consent decree litigation, it is certainly unreasonable to place the burden on the individual nonminority employees of the City, not to mention persons who are not yet City employees, to intervene in the litigation. See Safir v. Dole, 718 F.2d 475 (D.C.Cir. 1983) (Scalia, J.) (Safir's possible future reentry into the shipping business deemed too speculative to confer standing). Moreover, protective intervention adds to the high cost of litigation of the existing parties as well as subjects the intervenor to the possible assessment of attorney's fees if the defendant is ultimately deemed liable. See, Diamond v. Charles, 476 U.S. 54, 70 (1986); Reeves v. Wilkes, 754 F.2d 965 (11th Cir. 1985). Such costs and risks are simply too high to preserve the future rights of nonparties to object to a potentially illegal consent remedy.

The Supreme Court in Martin v. Wilks recognized that the existing rules provide a framework to allow parties to negotiate consent decrees yet ensure finality:

1. The existing parties to litigation are in the best position to determine who may be potentially affected by the relief sought in the litigation. Federal Rule of Civil Procedure 19 places the burden on the existing parties and the court to join all interested parties in litigation.[10]

Moreover, the claim that the firefighters should have intervened in the decree case contradicts the position which the City took in the appeal from the intervention proceedings that the Firefighters lacked a litigable interest which would support intervention. In 1983, the City told the Eleventh Circuit that the appellants lacked standing. See J.A. 549 ("with respect to the promotional goals the Firefighters fail to show a sufficient direct and personal injury to its members"). Similarly, the Lawyers Committee claimed the appellants lacked "standing to seek appellate review of the consent judgments." Brief of John W. Martin, 23, United States v. Jefferson County, No. 81-7761 (11th Cir.).

[10] Consent decree parties have an adequate remedy through joinder of nonparties under rule 19, F.R.Civ.P. Such a mechanism clearly provides the nonparty with a full complement of due process safeguards by notice through a summons, a date certain after which default may be entered, the tools of discovery, the opportunity to be heard through a full evidentiary hearing, and, most important, the right to appeal any adverse decision. Just as the employer believes the nonparty should perceive its interest and intervene, so too may the employer perceive the interest of the nonparty and join the nonparty at the appropriate time. The employer has sophisticated counsel with knowledge of the proposed consent decree and the skills to perceive the potential interest of the nonparty while the nonparty has no counsel or intimate knowledge of the federal court proceedings. Had Birmingham wished to bind the Firefighters to its settlement, it could have joined them under Rule 19 or refrained from opposing intervention. The fact that joinder will involve some cost should be of no consequence. See, Laycock, Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties, 1987 Univ. of Chicago Legal Forum 103, 144-153. Given its opposition to intervention, the City should not now be allowed to complain. Each time a complex claim of discrimination is brought before the courts involving diverse and

2. Large numbers of similarly situated persons may be joined into the litigation through the class action mechanisms of Rule 23. In such a case, the Court must ensure that the proper notice is given to class members and that the interests of class members are fully and adequately represented. Moreover, unlike objectors at a Fairness Hearing, a class which is approved by the Court has the right to appeal from the entry of a decree which affects its rights.

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competing interests, there are significant costs in terms of the litigation expenses and liability exposure of the parties as well as the allocation of scarce judicial resources. If the City desires to engage in a settlement the cost of which some third party is likely to bear, it should pay the price of either joining those parties in the litigation or facing the claims of those third parties in the future. Shifting the entire cost of settlement to innocent third parties should not be permitted. As Mayor Arrington has testified, the consent decree was "the best business deal [the City] had ever struck." J.A. 526. Congress should not countenance "business deals" at the expense of strangers to the litigation.

In ensuring the rights of the Firefighters to due process, the Supreme Court found that the Firefighters' claims against their employer are due to be heard in the context of independent suits. Such a rule is a reasonable procedural device which preserves the due process rights of nonminorities to have their claims heard. Firefighters believe their suits are the preferable means of resolving these types of claims, in view of the ability of the court not only to consider the facial validity of a decree-embodied plan, but also the conduct of the parties in implementing the plan. See, e.g., Johnson v. Transportation Agency, 480 U.S. _____, 107 S.Ct. 1442 (1987) (goal should be flexible based on the availability of minorities in relevant labor pool at the time of the preferential promotion rather than fixed at the time the plan is adopted); Fullilove v. Klutznik, 448 U.S. 448, 480-481 (1980) (Court only approved facial validity of set-aside statute and did not foreclose future challenges on a case-by-case basis).

We believe that racial discrimination should be identified and eliminated and the victims should be given a full remedy, but not one that infringes on the rights of innocent third parties.

If the Birmingham decree is valid and the City has acted lawfully, then the Courts will rule against my clients and we must accept that ruling. If it is not, then my clients have been done an injustice, are entitled to be heard, and should receive fair compensation and an end to wrongful conduct.

This bill is not content with just prospective application. Under its transition rules, it seeks to throw any employment discrimination case involving a prior decree out of court on a retroactive basis. Given the efforts the Birmingham Firefighters made to intervene before entry of the decree, this would be extremely unfair. My opponents would succeed in immunizing their racial program from appellate scrutiny forever.

This Committee should understand that in our multiethnic society, a decree which gives preferential relief for one group may, at the same time, impact adversely upon other minorities or females. While we believe this bill is primarily aimed at white males, it will also cut off the rights of Hispanics, women and other minorities seeking to make progress in the workplace.

The Supreme Court recognized that allowing suits such as Mr. Henson's will not create chaos but preserve the fundamental right of all to a day in court. While we believe section 6 does not provide a constitutional framework for adjudication of the rights of nonparties and the principle of Martin v. Wilks is good public policy, the retroactive application of the act is shockingly wrong and unfair.

Thank you.

The CHAIRMAN. First, Mayor Arrington, a number of the opponents of the bill charge that section 6 would insulate race-conscious remedies from challenge in the courts. That isn't so. Would you tell us why you believe that the procedures set forth in the bill will harmonize the rights of employers, such as the City of Birmingham, persons who have historically been excluded from employment like the black police and firefighters of the city, and the current employees, in your case, the white police and firemen and women. How do you believe that these procedures really harmonize those particular interests?

Mr. ARRINGTON. Well, first of all, Senator, as I understand the proposed legislation it would give notice to all interested parties. That would certainly be helpful. It would provide a forum for accommodating those interests of all parties that are implicated in this and hopefully would provide an opportunity to harmonize this matter.

I also think it would avoid the fiasco that we are now in of repeated litigation on the same issue, the same arguments and the great expense.

So I think this legislation is very important in harmonizing those particular rights of both whites and blacks.

The CHAIRMAN. Is it your sense that the later lawsuits that there were to challenge the decree were raising the same issues, covering the same ground, as the objections brought back in 1981?

Mr. ARRINGTON. I am totally convinced of that. I am totally convinced that the issues were first dealt with in the fairness hearing in 1981; that the attorney for the white firefighters union at that particular time stated their objections before the Federal District Court, declined the Court's invitation to put witnesses on—and I am not aware of their seeking from the Court any right of discovery.

So I am totally convinced that what we saw in 1981, what was argued in 1981 and argued again in 1985 and is about to be argued again this year, is giving several bites at the apple and creating a situation of endless litigation which is very expensive.

The CHAIRMAN. What is the impact on the social fabric in the community?

Mr. ARRINGTON. Well, I said in my opening statement that I am especially proud of the progress that we have been making in Birmingham, the biracial accommodation that we have in that city, and the resulting economic and social progress we have had in that city. But this continuing litigation and the issues surrounding it really threaten that progress. It has an impact, I think, on the morale and the relationship between employees. I feel that it has deepened the division between some of our employees, even within the Dire Department. I think the overall impact has been negative, and the sooner we can lay it to rest in a just fashion and a constitutional manner, which I think section 6 will contribute toward, the better it will be for us in the City of Birmingham.

The CHAIRMAN. Mr. Fitzpatrick, I just want to be sure that the record is clear on exactly what transpired in Birmingham.

Before the Court entered the consent decree, you appeared for the Firefighters Association to present objections to the decree. The Court heard those objections and then sought to intervene some 7

years after the lawsuit was filed. The Court overruled your objections and denied the intervention as untimely, and that decision was upheld on appeal.

Then you brought separate litigation on behalf of different named parties to raise the same objections to the decree that were considered and rejected by the Court back in 1981.

Is that essentially correct?

Mr. FITZPATRICK. Not exactly correct, Senator, if I may. The Firefighters Association did appear at the fairness hearing and indicated to the court that it felt that provisions of the decree would unlawfully impact on nonminority members of the department who were not parties to the litigation.

The Firefighters Association and two of its members filed a motion to intervene in order to become parties to the litigation so that they could have standing and the opportunity to attempt to contest the provisions of the decree. They wanted the opportunity to seek appellate review of the validity of the decree. Rather than allow the firefighters to intervene and have standing to go to the appellate court, the District Court shut us out, saying that we should have intervened in 1975 when the lawsuit was filed.

We did pursue the motion to intervene into the appellate courts, and the appellate court said there was no prejudice to the nonparty firefighters by the denial of the motion to intervene because the firefighters were free to file separate suits.

In those separate suits, Senator, we first challenged the validity of the decree on its face, but second, we have challenged the manner in which the city has implemented the decree, which we believe is in an unconstitutional fashion, certainly something that could not have been done in 1981. And we believe that the proper way for resolution of claims like this is after someone is impacted and after they are hurt, much like the Congress wants to rectify the situation caused by *Lorance*—after somebody is denied a promotion, then he should go to court.

The CHAIRMAN. Of course, there is nothing in section 6 that denies the possibility of raising the issue subsequently if there is not compliance with the initial decree. We will get into the question of whether there was adequate due process in terms of the procedures; that will be discussed by various constitutional authorities.

The point I just want to have settled in my mind is the substance, the objections, were the same, effectively.

Mr. FITZPATRICK. Well, no, Senator, I don't think they are completely the same, and I cannot concede that point.

The CHAIRMAN. All right.

Mr. FITZPATRICK. But implementation may be——

The CHAIRMAN. As to the objections that were raised, as I understand the points that Mr. Henson spoke very eloquently about—maybe I am missing something, but I thought he made his point and made it very well. And those were the points as I understand it, that were raised in the earlier hearings. Now, those were raised before, and raised subsequently. You make the point that what was done later did not comply with the earlier consent decree. If that is the case, section 6 doesn't even deal with it, as I understand what the Mayor has said and what Mr. Henson has testified to and makes the case. It is one I have heard on other occasions, and those

objections were raised earlier, raised subsequently, and finally raised.

Mr. FITZPATRICK. Some of the objections were raised, Senator. But no appellate court has ever been able to rule on those objections. We want an opportunity to seek appellate review of the validity of this decree. That is an opportunity we have never had.

The CHAIRMAN. OK. Let me ask Mr. Henson—if you had heard about this court decree, and you thought that you were going to be hurt, would you have sought to challenge the decree at the time?

Mr. HENSON. Certainly, if I had thought I was going to be damaged. I had heard that the city was involved in litigation and was negotiating to ensure that discrimination did not exist within the hiring and promotion practices of city employees. That was something that I didn't feel threatened by or would cause me any problem. If they did not discriminate, that's fine. I had no objection.

The CHAIRMAN. Would you agree with me that if you had known that that was going to be the result of it, as you have said now, that you were going to be damaged by it or hurt by it, don't you think it would be better to find that out earlier when the decree was being established than apparently later on, when you did find it out?

Mr. HENSON. Well, certainly, if I had known that the agreement that they reached was going to take away my opportunity for a promotion, I certainly would have tried——

The CHAIRMAN. Well, you'd agree that's the time to hear about it.

Mr. HENSON. It would certainly be better to hear about it earlier than later, certainly.

The CHAIRMAN. Senator Hatch.

Senator HATCH. But you didn't realize that at the time.

Mr. HENSON. At the time I did not realize it.

Senator HATCH. You had no idea at all that your rights were going to be taken away.

Mr. HENSON. None whatsoever. All I knew was that they were going to have policies that ensured that racial discrimination did not exist, and that was fine with me.

Senator HATCH. And you only fond that out long after the consent decree was entered into, right?

Mr. HENSON. That's correct.

Senator HATCH. And that was only after you had passed the test and come in No. 6, right?

Mr. HENSON. That's right, yes, sir.

Senator HATCH. And then to be replaced by somebody else, regardless of color or whatever, who was No. 85, that was pretty hard to take, wasn't it?

Mr. HENSON. It was very hard to take, Senator.

Senator HATCH. And especially since he did not have the 2 years of education that you had with regard to firefighting, right?

Mr. HENSON. Right, yes, sir.

Senator HATCH. And he didn't have some of the other training that you had.

Mr. HENSON. That's correct. I felt that obviously I was denied an opportunity because this consent decree puts more emphasis on

racial issues, or on the race of the applicant, than on qualifications. And I didn't——

Senator HATCH. And you didn't care about race yourself.

Mr. HENSON. I wasn't concerned with that.

Senator HATCH. In other words, if he were No. 6 and you were No. 85, you'd expect him to get the job, right, or the promotion?

Mr. HENSON. That's true, that's certainly true. I would have had no objections at all, and didn't to those who were higher on the list than myself.

Senator HATCH. Well, plus, isn't it better to bring a case after you know you have been hurt?

Mr. HENSON. It is certainly easier to——

Senator HATCH. If you don't know——

Mr. HENSON [continuing.] Have a case once there is a fact, rather than speculation on what could happen in the future.

Senator HATCH. If you don't know you are hurt, it is tough to bring a case, isn't it?

Mr. HENSON. Very difficult.

Senator HATCH. As a matter of fact, when they told you that they were going to enter into a consent decree, or they were in litigation to try and resolve discrimination matters, you thought that was a good idea, didn't you?

Mr. HENSON. I could not possibly know how I would not be hurt, or how I could be hurt, if there was no discrimination.

Senator HATCH. Yes. If there is no discrimination, that means no discrimination not only against the person who took your promotion, but against you.

Mr. HENSON. That's correct. I did not realize that they were going to try to resolve discrimination by discriminating against me.

Senator HATCH. I think that says it all, really. I know that there will be a lot of glib comments about your statement, but unless you sit in your position, it is pretty hard to understand it.

Now, let me also say that I understand what the Mayor and others are trying to do, too, because there is a history of discrimination against blacks that was terrible, and something has to be done. I agree with that. But regardless of what is done, it seems to me that you are making the case that I ought to at least, as Mr. Henson, have a right to bring my wrong to court. If the Court decides I wasn't harmed, or this is just something that I have to go through, I guess you can live with that—you wouldn't be happy with it, would you?

Mr. HENSON. Well, I wouldn't be happy with it, but it seems like—you know, I am not all white males; I am just me. And if I am denied a promotion, it is me that loses the promotion. And I would like to have my case as an individual addressed in court and have my day in court.

Senator HATCH. Well, I think you are more articulate than anybody we've had so far in all of our hearings.

Now I want to chat with my friend Mayor Arrington. I want to personally tell you I appreciate the job you are doing in Birmingham. You are a great mayor. It is not an easy job.

Mr. ARRINGTON. Thank you, Senator.

Senator HATCH. And these are not easy cases, and I know that. We do have to redress racial discrimination—racial and gender dis-

crimination—in our courts wherever that occurs, and we know it occurred in Birmingham, no question about it. And I am not challenging the fact that the court should redress it; that's not what I am challenging.

I think you would agree with the general proposition that in remedying discrimination, we need to be careful to avoid using remedies that infringe on the rights of innocent third parties.

Mr. ARRINGTON. Is that a question to me, Senator?

Senator HATCH. Yes, as a general proposition.

Mr. ARRINGTON. Generally, I agree. I am familiar with the fact that the courts have ruled, I think, over a period of time that sometimes in order to give relief that the relief has to be race-conscious relief. For example, the objections filed at the fairness hearing by the attorney for the firefighters really challenged the race-conscious relief of the consent decree. So I do think we have to be careful about this. But I do think we have the right and the responsibility to provide that relief within that framework.

Senator HATCH. OK, I see your point. But it seems to me the nonminority firefighters in Birmingham who are seeking to be free of discrimination, racial discrimination, in promotions, at least in the case of Mr. Henson—let's limit it to him here, since he is here—he is an innocent third party, right?

Mr. ARRINGTON. Well, I don't know if he is—we are talking about a class. There is a lot of debate about who is responsible for past discrimination or the remaining vestiges of it. I sometimes think that while that may be a necessary part of the debate that the focus really needs to be on whose responsibility, and I think it is a joint responsibility for us to correct it.

I have never been totally sold on the argument that discrimination that exists in one generation has no impact at all on subsequent generations. I feel that advantages that accrue to one group because of discrimination over several generations, that those advantages are passed on to subsequent generations.

I think disadvantages accrued by blacks as a result of segregation and discrimination, those disadvantages also pass on. It is not so clean and clear that the advantages do not pass on from generation to generation.

Senator HATCH. You are not alleging here, though, that Mr. Henson was part of that past generation that caused the racial discrimination.

Mr. ARRINGTON. I am not alleging that Mr. Henson was a party to it, but I am raising the possibility that Mr. Henson, as a white male, may have benefited by the long history of discrimination against blacks in favor of white males.

Senator HATCH. It seems to me if he passes a test and comes in No. 6 on that test, and he has certain education, background, training, experience, and so forth, and somebody who is 85th on the list as a result of the test, without the same background and education but does have about a 3-year seniority over him, that should have to be taken into consideration—that he is hardly a beneficiary under these circumstances of the past discrimination.

Mr. ARRINGTON. Well, Senator, my response to that would be two- or three-fold. First of all, the matter of the test has to be taken into consideration, and the matter of the validity of the test.

I don't think the test has ever been proven valid. I don't think the test has ever been——

Senator HATCH. But you see, Mayor, that may be a good point, and that may be the ultimate that keeps Mr. Henson from—he has already had his promotion, but would keep him from it. And maybe the court will decide that that is a factor that weighs rather heavily in favor of the person who was No. 85 on the test.

I am not disputing that. There may be ways that the court under current laws still would find against Mr. Henson at that time, but he at least ought to have the right to come in and say, "These are reasons why I don't think those ways are valid." That's all that is involved here. We are not talking about property, real property, personal property, and bankruptcy and those types of cases. We are talking about fundamental constitutional rights. And it seems to me it is very difficult to take away those rights to have their side of the case heard, regardless of whether they are going to win or lose, under these circumstances.

But I understand your position. I think you are eloquent in what you have said. And you may be right in the end. The courts, under even current law, may decide for various reasons that, yes, this may not come out just right for Mr. Henson, but they may disagree with his case assuming that it is retried—I don't know about that, but the real issue is should he be barred from having that opportunity to at least have his side of this matter heard. I think that is what Mr. Fitzpatrick is saying. Certainly, that is what Mr. Henson is saying, and certainly that is what I believe.

Mr. ARRINGTON. Senator, I was simply trying to make the point that Mr. Henson has that right. I argued for that right. Section 6 would certainly protect that right, but at the same time it would stop cities and other employers from being the victims of endless litigation when every employee wants to bring up the case.

For example, if they are not raising new issues, and if it is the same issue that we allow every firefighter, year after year after year, to bring this up when the issue has been litigated over and over again—and every promotion we made in the beginning, the first six or seven promotions we made of blacks, the white firefighter union went into court and got a temporary restraining order to stop those promotions while the Federal District Court made a determination as to whether or not those blacks were qualified to fill those positions. And in every case, the Court ruled that those promotions should go forward. That would also be true, I believe, in Mr. Henson's case.

Senator HATCH. We'll see. I suppose we'll see.

My time is up, Mr. Chairman.

The CHAIRMAN. I think the issue is really joined on that exchange. Our committee is not getting into the appropriateness in terms of the affirmative action program that has been developed. The real issue and question before us in terms of section 6 is whether there was adequate notice so that people that were going to be aggrieved would be able to protect their rights.

Senator HATCH. I agree.

The CHAIRMAN. That's really the issue.

Senator HATCH. I agree in part with that.

Mr. Chairman, Senator Grassley has asked me to put into the record as of the February 23 hearing a letter from him to you.

The CHAIRMAN. It will be so included.

[Letter from Senator Grassley follows:]

LETTER TO SENATOR KENNEDY FROM SENATOR GRASSLEY DATED MARCH 5, 1990

Dear Mr. Chairman:

As one who is anxious to end the long-standing double-standard under which Congress enacts civil rights and labor laws that apply to all but Members of Congress, I was gratified to hear about your statement at the February 23 hearing on S. 2104.

As I understand it, in the hearing you expressed support for an amendment making title VII applicable to Congress and stated, "[w]e did that with regards to the ADA which was reported out of this committee as well."

Just so that the record is clear, the Americans with Disabilities Act of 1989 (S. 933), was reported out of your committee after such an amendment was knowingly and intentionally excluded. It is my understanding that during a markup, Senator Hatch was prepared to offer an amendment to apply S. 933 to Congress, but that you urged him to withdraw the amendment, citing jurisdictional problems.

After noting this gap in coverage, I offered the Grassley Amendment to the ADA that, for the first time in the history of civil rights legislation, makes its terms and provisions applicable to Congress. I recall vividly that when I offered my amendment on the floor, I faced considerable opposition, including opposition privately expressed from yourself.

In offering the Grassley Amendment, I believed that Congress should not be above the law it passes for the rest of America. I am proud to see my amendment become a part of S. 933 and I hope you will work with me to ensure that it prevails in any House-Senate conference.

I respectfully ask that this letter appear in the record of the February 23 hearing.

Sincerely,

Charles E. Grassley, U.S. Senator

The CHAIRMAN. We are glad to welcome Senator Coats and Senator Thurmond. We appreciate your participation. We started our hearing today at 8:30 so that we will be able to have a timely recess for Mr. Andreotti's presentation to the Congress, so anything you can do to cooperate with the chair is appreciated because we have other witnesses who have come a long way.

Senator Coats.

Senator COATS. Mr. Chairman, I have a statement that I would like to submit for the record.

The CHAIRMAN. It will be placed in the record as if read.

[The prepared statement of Senator Coats follows:]

PREPARED STATEMENT OF SENATOR COATS

Senator COATS. Mr. Chairman, even in the most open society there must be some closed questions. And undoubtedly the most essential is the equal treatment of all its members, a uniform respect for individual worth. It is an imperative rooted in Judeo-Christian principle and national precepts. It is a demand of conscience and compassion.

The history of America is propelled by the gradual widening of that circle of legal inclusion and protection. To minorities and women. to the innocent and the elderly and the handicapped. We strive to create a society where the only entrance fee for contribution and accomplishment is talent and industry.

That task is not accomplished. But our progress must not be devalued. Within the memory of most here discrimination had

the sanction of law. The humiliation of a few was the policy of courts and legislatures. Those wounds are still fresh—easily reopened by outbreaks of racial hate. But the law has become a friend of equality.

As we look at civil rights legislation, however, it is important to maintain one distinction. Numerical racial imbalance is a challenge to our persuasion and leadership—a compelling reason to provide incentives for inclusion. Racial discrimination, on the other hand, is a violation of the law that merits our prosecution. There is a difference.

Numerical imbalance is the result of a national history we must transform by recruitment, education and training—all the elements of equal opportunity. Discrimination is a criminal act of will and intention, or perhaps of the grossest sort of negligence.

Imbalance does not, in itself, prove discrimination. But that is not a reason for complacency. Redressing racial imbalance requires innovation—beyond tried and discredited quotas.

We have already seen some limited but encouraging success. The number of black sales workers nationwide quintupled from 1980 to 1986. The number of black managers increased more than 54 percent. The number of Hispanic professionals increased by 70 percent. Asians enjoyed the biggest gains, doubling their numbers of managers and professionals.

But this is progress beginning from a level so low that the inequities are still great. We can see it right here at home. Out of 2,500 professional staffers on Capitol Hill, only 77 are black.

We need to find solutions. But we need to look beyond rigid quotas or other purely numerical answers. A truly color-blind society is not an unreachable ideal or outdated utopia, existing only in naive civil rights rhetoric of the past. It is the substance of equal treatment under the law. Purchasing any goal, no matter how noble, at the price of race-based preference is not compassion, it is injustice. It engenders resentment and insults those who refuse to be patronized.

I look forward to hearings that will focus our attention on a great need, but challenge our ingenuity to seek a color-blind society. Thank you.

The CHAIRMAN. Senator Thurmond.

Senator THURMOND. Mr. Chairman, I would request that my statement be included in the record.

The CHAIRMAN. It will be so included.

[The prepared statement of Senator Thurmond follows:]

PREPARED STATEMENT OF SENATOR THURMOND

Senator THURMOND. Mr. Chairman. I would like to commend you for holding the final hearing before this committee on recent U.S. Supreme Court decisions on discrimination.

Today we will receive testimony on the U.S. Supreme Court's holding in *Martin* v. *Wilks*. In that case, the Court ruled that nonminority plaintiffs who had not participated in a court approved consent decree had a right to challenge the decree in subsequent litigation.

A majority of the U.S. Supreme Court reaffirmed the principle of our "deep-rooted historic tradition that everyone should have his own day in court." Also, the Court also pointed out "the general rule that a person cannot be deprived of his legal rights in a proceeding to which he is not a party."

I believe that the U.S. Supreme Court clearly rejected the doctrine of "impermissible collateral attack." Heretofore, consent decrees were viewed largely as immune from challenge by parties who failed to intervene in the underlying dispute. Chief Justice Rehnquist's opinion placed the burden on the parties to the lawsuit for joining all persons who they wish to be bound by the judgment or consent decree.

Mr. Chairman, to deny employees who were not party to a consent decree the opportunity to have their rights litigated raises substantial due process concerns. Employees who did not participate in a consent decree and were not joined as a party to the lawsuit should not be bound by the decree in that case. It is only appropriate and fair that these nonparty plaintiffs have an opportunity to be fully heard on the merits of their challenge.

I look forward to reviewing the testimony from the distinguished witnesses here today and regret that my schedule prevents me from remaining for the entire hearing.

The CHAIRMAN. Well, we want to thank you all very much for your testimony.

Mr. ARRINGTON. Senator, may I just make one request here?

The CHAIRMAN. Certainly.

Mr. ARRINGTON. Earlier there was a statement made, I believe, by one of my fine employees, Mr. Henson, who is indeed a very fine employee for the City of Birmingham, but in his statement he compared his situation to that of Carl Cook, the black firefighter. I would like to request that Mr. Cook be permitted to submit a responsive statement.

The CHAIRMAN. Fine. That is very fair. It will be so included.

Thank you all very much.

Mr. ARRINGTON. Thank you.

[The prepared statement of Carl Cook follows:]

PREPARED STATEMENT OF MR. COOK

Mr. Chairman, my name is Carl Cook. I appreciate the opportunity you have given to me to submit this statement. I am a black man. I am an employee of the Fire and Rescue Service of the City of Birmingham, AL. I understand that James Henson tesitified before the committee last week and compared himself to me, claiming he was a victim of discrimination in promotions. This is surprising since Mr. Henson, a white man, is now a Fire Captain, while I am only a Fire Lieutenant. Perhaps if I described some of my personal history you could see who is the real victim of race discrimination.

In the spring of 1963, I was a junior in high school in Birmingham. I participated in demonstrations led by Dr. Martin Luther King, Jr. to end racial segregation in Birmingham. I got firehosed by the Birmingham Fire Department.

I first tried to get a job as a firefighter with the City of Birmingham after I graduated from high school in 1964. I was told there were no jobs available. It was common knowledge to me and to everyone else in Birmingham at the time that only "whites needed to apply". In fact, not long before then, the job announcements for firefighter said "whites only".

I became a firefighter 10 years later in 1974. This happened only after the lawsuit was filed against the city by the Lawyers' Committee. Before the lawsuit was filed, only one black person had ever been made a firefighter in the history of the city. If I had been hired in 1964 when I first applied. I would probably have been a Fire Lieutenant many years before Mr. Henson was ever up for that job.

Mr. Henson says he was a medic, a driver and an acting officer and I was not. In fact, I was certified as a driver in 1979. I drove a fire truck from 1979 until the time I was promoted to Fire Leiutenant in 1984. What Mr. Henson did not tell you was that blacks could not become medics or acting officers because of race discrimination and that the judge found in 1985 that it was unfair to use this discrimination against black people like me. It is not that I did not try to become a medic. I applied for training as a medic in 1976 and again in 1978, but was refused. The sad fact was that black persons were not permitted to have such training. Before the consent decrees, blacks were never made medics or leadworkers or acting officers. The white supervisors picked who they wanted and they always wanted whites.

Mr. Henson talks about test scores, but not about the fact that the judge has never found that such test scores measure anything having to do with the job. Mr. Henson did not talk about the fact that most blacks, like myself, were not even allowed to take the promotion tests until after the judge approved the consent decrees because we had to get permission to do so from supervisors. Supervisors in the Fire and Rescue Service, all of whom were white, gave blacks "failing promotional potential" ratings most of the time, while passing most whites. This blatantly discriminatory ratings system was thrown out by the court in 1981 and black people finally could take the promotional tests.

I think if you will look at what has happened to blacks and whites in Birmingham, it is clear who the victims of race discrimiantion have been.

Thank you.

The CHAIRMAN. Our second panel consists of a witness who is no stranger to testifying on important matters before the Senate, Larry Tribe, Tyler Professor of Constitutional Law at Harvard Law School. We are very grateful for the excellent written statement you have submitted, and we look forward to your testimony.

STATEMENT OF LAURENCE H. TRIBE, TYLER PROFESSOR OF CONSTITUTIONAL LAW, HARVARD UNIVERSITY LAW SCHOOL, CAMBRIDGE, MA

Mr. TRIBE. Good morning, Senator Kennedy, Senator Hatch, Senator Coats, and Senator Thurmond.

It is an honor for me to be here today, and I will try to be very brief. I understand the Senate's schedule, and I certainly won't simply repeat my testimony.

There was a time beginning in, I guess, 1954 when this Nation could look to the U.S. Supreme Court of the United States for the consistent and vigorous enforcement of civil rights. That period lasted for at least a quarter of a century. If it was unclear before 1989, I think there can be very little doubt as of 1990 that the bulk of that task has fallen, at least for the time being, to a different branch of government—to the Congress of the United States.

The Bush administration, for example, agrees that a number of the U.S. Supreme Court's decisions in 1989, aspects of *Patterson* and of *Lorance*, whatever might be said of them in terms of interpreting what the Congress had once done really create an indefensible situation in terms of civil rights in this country. And I think it is worth nothing that although there may be differences of detail and degree about the precise scope of the remedies needed, there is very little disagreement that something serious and substantial needs to be done and can only be done by this body to remedy the very grave impact on the progress of civil rights that was done by the U.S. Supreme Court in 1989. And I do want to commend you, Mr. Chairman, and this committee and the Senate for giving serious attention to what precisely should be done for rising to the challenge that effectively the Court has placed before this body.

I think it is important to recognize that the U.S. Supreme Court majority itself in the opinion of Chief Justice Rehnquist in *Martin* v. *Wilks* was quite explicit about Congress' responsibilities and its authority. Quoting very briefly from footnote 2 of Chief Justice Rehnquist's opinion, the Court recognized that Congress has power to create what he called "a special remedial scheme expressly foreclosing successive litigation by nonlitigants"—by definition, "nonlitigants" are people who have not had their own precise day in court—"as for example," he says, "in bankruptcy or probate, so long as the scheme is otherwise consistent with due process."

Now, it is, I think, universally agreed that employment discrimination litigation, like bankruptcy or probate litigation, may affect numerous and sometimes unknown or even unknowable interests, and may involve very important human rights on both sides of the equation.

It seems to me that section 6, which I have been invited to testify about, strikes a sensible balance among those competing worthwhile interests.

And I think in trying to understand that—and I was really brought to mind of this primarily by the eloquent testimony of Mayor Arrington—one really has to say a few words about why the interests advanced in section 6 are really so overwhelmingly significant for this Nation at this period in our history.

There are many areas, of course, where finality and repose, getting on with it, are terribly important. The U.S. Supreme Court recognizes that when it decides in the criminal area, for example, that endless relitigation just cannot be tolerated.

But it seems to me that there are very few areas in which finality and repose and moving on are as important to the cohesion of this country as the areas of sex and especially race discrimination.

As the Mayor of Birmingham so clearly pointed out, whole communities have been divided by these matters. The Nation yearns to move on. And I think section 6 provides a means of doing that.

Unless Congress does act, I think it is very important to recognize that we will not simply have failed to remedy a problem—the country will face a new and very serious problem. That is, in order to provide binding relief for wrongs that we all agree—Senator Hatch was saying that in his view, too, these are wrongs that must be remedied; remedies are not worth the paper they are written on unless finally, some day, they can be implemented—in order to get those remedies, plaintiffs in discrimination suits are going in effect to have to sue every white and every male around by essentially joining them as defendants under rule 19, or through suing every possible future firefighter in a class, a defensive class, under rule 23.

It is hard for me to conceive of a more inflammatory step than for every piece of litigation in this area to have to create that degree of confrontation and universal polarization.

It is also hard for me to imagine any step that would be more likely to trigger virtually impossible problems of fair and adequate representation and the allocation of the costs of litigation.

There are a great many white firefighters in Birmingham who might not have wanted to be involved as defendants in that original lawsuit, who might not have wanted to bear part of the cost and the burden of that litigation. But those who did certainly cannot say that they weren't notified of what was going on.

Of course, the solution to which Congress comes has to be consistent with due process. That is a value that cuts both ways. We are not talking only about fairness to white firefighters. We are also talking about fairness to minorities. Groups like the white firefighters that you heard from today deserve fair representation. But keep in mind what would happen if something like the solution of *Martin* v. *Wilks* remains the law of the land. If it remains the law of the land, then when Federal courts enter decrees that protect, for example, as a Federal Court in 1982 did, white male EEOC attorneys from reverse discrimination, that was a decree that operated arguably in a way that hurt a lot of minorities. But under *Martin* v. *Wilks*, there is no end to how often—every time any step is taken to implement that decree, which was designed to protect white attorneys from discrimination—every time such a step happens, one reopens the whole thing, and the same arguments can be heard over and over again.

So in judging that section 6 is fair and constitutional, people in my situation, who are every bit as concerned about due process of law as about equality, obviously have to take into account that this is not a tilted, slanted law; it cuts both ways. The concern for fairness is therefore absolutely vital. It is vital to the civil rights community as it is vital to those who are fighting for the rights of white nonminority employees.

So one has to ask what are the fundamental requirements of due process. Well, they have been clear for 40 years since the *Mullane* case—notice and an opportunity to be heard. And those precise requirements are carefully and clearly provided in the structure of this law.

Subparagraph A of section 6 deals with people who receive actual notice, notice that the judgment or order might affect their interests, whatever might be true of someone who testifies here that he didn't know a judgment was going to be entered that might affect his interest. Well, if that is true, then he is not foreclosed by this section; it is only people who have the requisite kind of notice who are covered by A. And notice alone is not enough. They also must have a reasonable opportunity to present their objections. That is not some novel formulation. It comes straight from U.S. Supreme Court decisions going all the way back to *Mullane* in 1940.

Subparagraph A, then, even in its retroactive application, does not upset any settled expectation. There is really no fundamental unfairness in precluding after-the-fact challenges by people who knew that their interests might be adversely affected, who had a fair opportunity to make a challenge at the time that even in their own testimony they admitted would have been better. By not acting then, such people knowingly take the risk that the litigation may adversely affect their interests. Sitting by the sidelines is always comfortable, but it has costs, and section 6 would recognize those costs, doing so I think in a clearly constitutional way.

Subparagraph C precludes challenge if the Court that entered the judgment determines that reasonable efforts were made to provide notice. What it does, therefore, is cover those people who didn't really know and hence don't meet the requirements of subparagraph A, but were the object of constitutionally sufficient procedures to try to help them know.

My friend and colleague, Charles Fried, says that provision is right off the map. Well, the map it comes from is the *Mullane* map. That is, *Mullane* itself clearly held that even people who did not happen to know cannot endlessly reopen and relitigate matters when reasonable and sufficient constitutionally adequate methods were made to try to inform them—mailing it to them if you know their address; publishing notice in newspapers of wide circulation if you do not know their address.

So it seems to me that the objection that subparagraph C is somehow insufficient just will not hold up.

Finally, subparagraph B deals with a rather different problem. It precludes a person from challenging the outcome of an employment discrimination suit, challenging implementation of the decree—not challenging, by the way, whether the decree is being violated—you can always do that, as the Chairman pointed out—but challenging steps that are taken simply in the undisputed implementation of the decree, whenever the Court determines that their interests were already adequately represented—adequately represented—by someone essentially with identical interests. And in a case like *Wilks*, it was by someone with the same lawyer. The question is whether that is constitutional. And again, some have said that the principle that each person has to have his own day in court is absolutely inviolate. That would be news to the Federal courts in the First, Third, Second, Fifth, and Ninth Circuits, all of which have upheld provisions of the Federal Rules of Civil Procedure under rule 23(b)(1) and 23(b)(2), which provide for a rather standard form of class action in which all of those courts have said with really no significant dissent that the only constitutional re-

quirement of due process is that there be adequate representation of the interests of people in the class—not that each member of the class be personally notified, be given a personal opportunity to come in, hire his or her own lawyer, opt out if they are not satisfied.

The whole idea of settling matters that uniformly affect a whole group of people would be impossible if one were to take that view.

Now, of course, every one of us is distinct. Mr. Henson is, as he so eloquently put it, just one guy, and in a sense, whenever anyone says, "But wait a minute—shouldn't you hear from me, too?" it does pull on the heartstrings, but those are not constitutional heartstrings that are pulled on when he has been adequately represented with respect to the very same claim. And all that subparagraph B does is to borrow from very settled rules in the area of 23(b)(1) and 23(b)(2) class actions to say that you do not have to in effect sue everybody in sight in the first instance, as long as they are adequately represented. You do not have to notify everybody as long as there is adequate representation of their particular interests, and that has to be determined by a court of law.

Now, nothing about that principle turns on the technical difference of whether it is a class action or not a certified class action. The constitutional principle is the same either way. There is nothing magical or talismanic about the phrase "class action" that would suddenly make due process irrelevant.

So that I do caution this committee if the committee were to conclude that subparagraph B goes too far in obviating the need for personal notice when there is adequate representation of the interest at stake, then the committee would effectively be saying that an important, long-established, well-settled, virtually universally-utilized aspect of the Federal Rules of Civil Procedure goes out the window. Maybe that has to happen, but I wouldn't jump to that conclusion until the U.S. Supreme Court so held, and I don't think one can predict that it would so hold.

So taken in its entirety, it seems to me that section 6 can best be understood as Congress' even-handed effort to insulate employment discrimination judgments and consent decrees not from a fair day in court—that is provided—but to insulate them from endless, endless relitigation while complying fully with due process guarantees.

I share the bill's goal of achieving in many ways what the Court in 1989 made it very hard to achieve. But even so, I would oppose the measure if I regarded section 6 as sacrificing the basic fairness to every American that is guaranteed by due process of law. I think that Senator Hatch and Senator Kennedy both know that I would.

Believing that section 6 does not sacrifice those rights on the altar of some utilitarian objective, I strongly and enthusiastically support its enactment.

Thank you, Senator.

The CHAIRMAN. Thank you very much.

[The prepared statement of Mr. Tribe and questions and answers follow:]

PREPARED STATEMENT OF LAURENCE H. TRIBE

I am grateful for this opportunity to comment on the constitutionality of Section 6 of the proposed Civil Rights Act of 1990. In substance, Section 6 would amend the Civil Rights Act of 1964 to preclude (except in limited circumstances) belated collateral challenges to employment practices that implement judicial orders or consent decrees, except in those circumstances where there was constitutionally inadequate notice of those proceedings or the lack of an opportunity to challenge those orders or decrees before they went into effect.

Section 6 strikes a balance between, on the one hand, the values of finality, efficiency, and equal employment opportunity that underlie Title VII; and on the other, fairness to those who, while not themselves responsible for employment discrimination, may find that their own employment opportunities are affected by Title VII litigation.

Although Section 6 is part of a larger bill that changes the substantive law in employment discrimination cases, Section 6

itself expresses no preference for the claims of any particular group. My friend and colleague Charles Fried has suggested that Section 6 reflects hostility toward equal protection claims by nonminorities. While I cannot speak for the varied subjective motivations of the bill's numerous backers, I have no reason to disbelieve their disavowal of any such hostility. And, judging Section 6 by its text, it is clear that it exhibits no such hostility. It is as preclusive of challenges claiming that a given judgment or consent decree is insufficiently protective of minorities as it is of challenges claiming that it is unfair to nonminorities. Rather than preferring minorities to nonminorities, or blacks to whites, Section 6 opts for finality and repose over endless litigation.

Careful study of Section 6 leads me to conclude that its language does not violate constitutional guarantees; the provision can easily be interpreted in a way that is fully consistent with the constitutional requirements of due process.

Section 6 responds to the Supreme Court's recent decision in Martin v. Wilks.[1] In that case, the Court held that employees who were not parties to the litigation that produced a consent decree, but claimed to be adversely affected by the decree, were entitled to challenge employment decisions implementing that decree. Writing for a majority of five, Chief Justice Rehnquist argued that this result was a straightforward application of the Federal Rules

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[1] 109 S.Ct. 2180 (1989).

of Civil Procedure.[2] In the absence of an explicit congressional determination that Title VII litigation raises concerns warranting procedures that differ from those applicable in ordinary private law litigation, the Court declined to depart from the usual rule that an individual cannot be bound by a decision in a case to which he or she was not a party.[3] The Court reasoned that, given the existing federal rules regarding the issue, a different decision would "require a rewriting rather than an interpretation of the relevant rules."[4]

Section 6 represents Congress' response to the Court's invitation, one prompted by the recognition that finality is particularly important where discrimination suits have divided entire communities. It seeks to avoid repetitive litigation such as that engendered in Martin v. Wilks by altering some of the procedural rules surrounding Title VII and related litigation. Martin v. Wilks was an interpretation of Title VII and the Federal Rules of Civil Procedure. Both are important statutory constructs, but they are only statutory constructs. Congress is certainly free to adopt a procedural rule different from the one that the Court read those statutes to provide. There are, of course, constitutional limits to the kinds of procedural rules that Congress may adopt. My conclusion, however, is that Section 6 fits

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[2] See id. at 2185-86.

[3] See id. at 2184.

[4] Id. at 2187.

within these crucial limits.

The Martin v. Wilks majority itself recognized that Congress has the power to create "a special remedial scheme . . . expressly foreclosing successive litigation by nonlitigants, as for example, in bankruptcy or probate [so long as] the scheme is otherwise consistent with due process."[5] Employment discrimination litigation, like bankruptcy or probate litigation, invariably affects numerous and sometimes unknown and even unknowable interests. Section 6 strikes a sensible balance among these competing worthwhile interests. Like any compromise, it will not please everyone. However, since, as I conclude below, Section 6 is consistent with due process, it provides precisely the kind of special remedial scheme that Martin v. Wilks and the Constitution permit.

The fundamental requirements of due process are notice and an opportunity to be heard. The contours of these guarantees were explained by the Supreme Court nearly forty years ago in Mullane v. Central Hanover Bank & Trust Co.,[6] a case concerning the constitutional sufficiency of notice given to trust beneficiaries regarding litigation surrounding that trust. In Mullane, the Court held that in order for a judgment "to be accorded finality," notice must be "reasonably calculated, under all the circumstances, to

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[5] 109 S.Ct. at 2184 n.2 (citing NLRB v. Bildisco & Bildisco, 465 U.S. 513, 529-30 n.10 (1984), and Tulsa Professional Collection Services, Inc. v. Pope, 108 S.Ct. 1340 (1988)).

[6] 339 U.S. 306 (1950).

apprise interested parties of the action and afford them an opportunity to present their objections."[7]

Mullane held that what reasonable notice and opportunity entail depend largely upon the ease with which particular interested parties can be notified. There were essentially three types of persons interested in the outcome of the litigation involved in Mullane. First, there were interested individuals whose names and addresses were already known to the trustee, often because the trustee regularly mailed to these individuals funds accruing from the trust. Second, there were other beneficiaries whose names and addresses were not easily obtainable, but who nonetheless had direct interests in the outcome of the litigation, including individuals who were the eventual beneficiaries of the trust. Finally, there were many individuals who were not themselves trust beneficiaries, and whose names and addresses were likewise unobtainable, but who might nonetheless have had "interests" in the outcome of the case -- for example, as heirs of proper beneficiaries.

The Court in Mullane held that the notice required by the due process clause varied among these three classes. For the beneficiaries whose names and addresses were readily available, direct notification of the litigation (at least via the U.S. Mail) was deemed necessary, while mere "publication" of the lawsuit was insufficient. However, for the beneficiaries who were unknown at

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[7] Id. at 314.

the time of the Mullane litigation, notice by publication was enough to meet constitutional due process guarantees. Mullane left open the question of what notice had to be given to the final group -- that of potentially unknowable yet interested individuals -- but the Court made clear that, if any notice was constitutionally required for such persons, publication would certainly suffice for them as well.

Section 6 of the Civil Rights Act of 1990, construed reasonably, complies with these constitutional due process requirements.

Subparagraph A deals with those individuals who received actual notice that such litigation was taking place, and who knew that a decree might result which could affect their interests. Subparagraph C, on the other hand, is addressed to individuals who were not actually notified, but with respect to whom reasonable efforts at notification were nevertheless made. Finally, Subparagraph B addresses a problem left open by Mullane, and provides procedural protection for those individuals who could not possibly have been notified of the existence of the litigation regardless of the "reasonableness" of the methods used, as well as procedural protection for those who might have been notified but whose interests are instead adequately represented by others.

Subparagraph A of Section 6 (§ 703(m)(1)(A)) precludes challenges by individuals who remained on the sidelines although they actually received "notice" that their "interests" might be affected by the employment discrimination litigation and were also

given "a reasonable opportunity to present objections" to any resulting judgment or order. This language virtually mirrors the fundamental basis of due process: notice and an opportunity to be heard. This subparagraph would bar individuals who either choose in the future, or chose in the past, to stay out of a lawsuit after receiving actual notice about that suit. This result is constitutional, since there is no fundamental unfairness in precluding post-hoc challenges by individuals who had actual notice that their interests might be adversely affected and an opportunity to make those challenges at the time of the litigation. By not raising objections they are aware they can raise, such individuals accept the risk that the litigation may adversely affect their interests. It is thus constitutionally permissible for Congress now to bar such individuals from belatedly deciding to advance those objections.

In concluding that Subparagraph A is constitutionally permissible, I have given full consideration to cases such as Zenith v. Hazeltine[8] and Chase National Bank v. Norwalk,[9] which may indicate that, in order for a party to be formally and legally "bound" by a judgment, that party must have received formal notice through judicially approved methods such as service of process. The majority in Martin v. Wilks did not dispute the dissent's observation that "[a]s a matter of law there is a vast difference

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[8] 395 U.S. 110 (1969).

[9] 291 U.S. 431 (1934).

between persons who are actual parties to litigation" -- as to whom the absence of formal notice and participation would preclude giving legally binding effect to the result even if they happened to know of the proceedings -- "and persons who merely have the kind of interest that may as a practical matter be impaired by the outcome of a case."[10] None of the justices disagreed with the point that "[o]ne of the disadvantages of sideline-sitting [by such persons] is that the bystander has no right to appeal from a judgment no matter how harmful it may be."[11] Although the majority and the dissent obviously differed as to whether Title VII and the Federal Rules of Civil Procedure should be construed so as to deprive these "sideline-sitters" of the separate opportunity to attack the judgment collaterally if they had actual notice but chose to remain outside the suit, there was no suggestion that due process confers any right to such a second chance. Neither Zenith nor Chase National Bank, nor any other case I have been able to find, stands for a general constitutional rule that notice must have been received in any particular way in order to estop an individual who, having actual notice of the potentially adverse effect of litigation in which she is interested, chooses to wait on the sidelines during those proceedings in hopes of later attacking the results collaterally. Both the majority in Martin

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[10] 109 S.Ct. at 2188 (Stevens, J., dissenting).

[11] Id.

v. Wilks,[12] and the four dissenters, recognized that the only prerequisite of estopping someone in this situation is the existence of procedures comporting with due process -- that is, actual notice and an opportunity to be heard. This is precisely what Subparagraph A provides.

Subparagraph C (§ 703(m)(1)(C)) precludes challenges "if the court that entered the judgment or order determines that reasonable efforts were made to provide notice to interested persons." Subparagraph C thereby covers those individuals who did not receive actual notice, and hence do not meet the requirements of Subparagraph A, but nevertheless were the object of constitutionally sufficient notification procedures. The "reasonable efforts" to which Subparagraph C refers are most naturally construed as incorporating the Mullane standard. Under Subparagraph C, individuals will be estopped from challenging "a litigated or consent judgment or order resolving a claim of employment discrimination" if those individuals had been the target of notification schemes satisfying Mullane's due process tests, notwithstanding the fact that they may not have actually received such notice. Properly read, Subparagraph C is simply a straightforward application of Mullane to estoppel in Title VII and related litigation.[13]

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[12] See 109 S. Ct. at 2184 n.2.

[13] It might, of course, be argued that Subparagraph C is deficient because it says nothing about making efforts to afford interested persons an "opportunity" to be heard, a factor explicitly articulated in Subparagraph (A)(ii). It is possible, perhaps, to read Subparagraph C so as to preclude challenge where

In sum, Subparagraph A binds those who receive actual notice and an opportunity to be heard, while Subparagraph C addresses those to whom notice was attempted through constitutionally adequate procedures but who nonetheless failed to receive actual notice. Arguably, Congress could stop there, for this may well be all the process that the Constitution requires. Where any efforts at notice would almost certainly be futile, Mullane may mean either that those who could not possibly have been notified -- e.g., generations yet unborn -- cannot possibly be bound by the judgment or, far more plausibly, that such individuals may be bound so long as it would not be fundamentally unfair to treat them as "represented" de facto by those who did receive notice and made the relevant challenges.

Subparagraph B (§ 703(m)(1)(B)) in part addresses this issue -- an issue seemingly unresolved by present case law and left unaddressed by Subparagraphs A and C. Subparagraph B precludes a person from challenging the outcome of an employment discrimination suit only "if the court determines that the interests of such

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notice was directed to all who might care, but where no effort was made to hear what they would have to say. However, this reading overlooks the overall scheme of Section 6, which divides interested parties into those who received notice and those who did not. Because Subparagraph C should be read as applicable only to interested persons for whom reasonable notification procedures proved ineffective, it naturally does not mention in addition a reasonable opportunity to be heard. Such an opportunity could only manifest itself if actual notice was indeed received, a situation existing only in Subparagraph A and explicitly lacking for individuals bound as a result of Subparagraph C. Efforts to provide notice should not be deemed "reasonable" under Subparagraph C if they were not accompanied by procedures for hearing the objections raised by those notified.

person were adequately represented by another person who challenged such judgment or order prior to or after the entry of such judgment or order."

Although it may be possible to read Mullane as indicating that such a person might be bound without even imposing a requirement that his interests be adequately represented in the original litigation, Subparagraph B provides this additional safeguard. Under Subparagraph B, since actual representation is obviously impossible, virtual representation is ensured.

Even when actual representation might have been possible, Subparagraph B, as written, allows preclusion whenever "the court determines that the interests of [the would-be challenger] were adequately represented by another person who challenged such judgment or order prior to or after the entry of such judgment or order." The federal decisional law strongly supports the proposition that notice is not constitutionally required in such circumstances; even without notice, absent individuals whose interests were adequately represented may be precluded from collaterally attacking a judgment -- particularly where they retain the ability, under Rule 24 of the Federal Rules of Civil Procedure, to seek intervention after the fact and, under Rule 60, to seek modification of the judgment as manifestly unjust. Since Section 6 expressly preserves "the standards for intervention under rule 24," one could not find this sort of application of Subsection B unconstitutional without casting a serious constitutional shadow upon Federal Rules of Civil Procedure 23(b)(1) and 23(b)(2), which

have commonly been read so as to make the results of those two kinds of class actions binding, on a virtual representation basis, on persons who received no notice in circumstances where reasonable notification efforts were not undertaken. The fact that those rules apply to class actions whereas Subparagraph B is not so limited is constitutionally irrelevant where, as under this subparagraph, preclusion occurs only after a determination that the precluded interests were adequately represented.[14]

Taken in its entirety, Section 6 can be best understood as Congress' even-handed effort to insulate employment discrimination judgments and consent decrees from incessant relitigation while complying with constitutional due process guarantees. I believe it succeeds in this attempt. Much as I share the bill's goals of restoring effective remedies for employment discrimination, I would oppose the measure if I regarded Section 6 as sacrificing the basic fairness to all that is guaranteed by due process. Believing that Section 6 does not do so, I support its enactment.

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[14] If it were nonetheless to be concluded that the Federal Rules are indeed unconstitutional to this degree, and that Subparagraph B could constitutionally be applied only where reasonable efforts at notification have been provided but actual notice has not resulted, it would be simple enough, given the structure of the three subparagraphs, to construe Subparagraph B as not purporting to have any broader application than this. But it would seem unwise to rush to such a construction of the provision, given the momentous consequences for class actions under the Federal Rules that would follow from the view that such a construction was constitutionally mandated.

QUESTIONS FROM SENATOR JEFFORDS FOR LAURENCE H. TRIBE

Question. On page 2 of your written testimony you stated your belief that section 6 "is as preclusive of challenges claiming that a given judgment or consent decree is insufficiently protective of minorities as it is of challenges claiming that it is unfair to nonminorities." Given the identities of the parties to a typical consent decree, doesn't section 6, subsection (2)(B) operate to preserve for minorities the right to challenge an employment practice implementing a decree that the remainder of section 6 operates to deny nonminorities?

Answer. Analysis of S. 2104, Section 6, Subsection (2)(B).

Section 6, subsection (2)(B) of S. 2104 states that the rules governing finality of litigated or consent judgments or orders shall not be construed to "apply to the rights of parties to the action in which the litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government." Senator Jeffords has asked whether this language grants to minorities greater rights to challenge judgments and consent decrees than nonminorities enjoy under the remainder of section 6.

I believe that under the most reasonable construction of the bill no such advantage is conferred. This is so for two reasons: (1) Because the terms of subsection (2)(B) apply equally to both minorities and nonminorities who were parties to a previous action; and (b) because subsection (2)(B) creates no additional rights in such parties but merely preserves those rights that parties to all Federal suits enjoy under ordinary rules of *res judicata*.

(a) The Literal Language of Subsection (2)(B).

As I noted on page 2 of my prepared statement of March 7, the rules barring relitigation contained in subsection (1) of section 6 apply to both nonminorities and minorities claiming that a judgment or order is unfair to their respective interests. The same is ture of subsection (2)(B) of section 6. All parties, class members, and members of groups on whose behalf the Federal Government sought relief in prior litigation are protected identically by subsection (2)(B).

Nevertheless, given the typical identity of parties to employment discrimination litigation, Senator Jeffords has asked whether the practical effect of subsection (2)(B) might not be to favor minorities over nonminorities. I do not believe that this will be so, since—with one exception—the rights preserved by subsection (2)(B) are the rights of parties and class members on both sides of employment discrimination cases.

The exception is the preservation of the rights of members of groups whose interests were asserted by the Federal Government rather than the rights of those against whose interests the Federal Government may have argued. Whether or not it is true as an empirical matter that the Federal Government has in the past asserted the rights of minorities more often than it has asserted the rights of nonminorities, it is far from clear that this will always be so. Furthermore, to the extent that executive branch policy favors suits by minorities over nonminorities or vice-versa, that, it seems to me, would be a preference expressed by the executive branch, and not by S. 2104.

(b) Subsection (2)(B) Creates No New Rights.

By its terms, subsection (2)(B) creates no new rights to challenge judgments or consent decrees, but merely clarifies that the preclusion rules of subsection (1) do not operate to deprive parties of the rights they otherwise would enjoy as parties to a prior lawsuit. Subsection (2)(B) does not thereby advantage those individuals who fall within its terms for the simple reason that the background rights that subsection (2)(B) preserves are the rights of parties to past litigation: Since, under the background rules of *res judicata*, a party to a lawsuit is actually legally bound by the decree resolving that lawsuit,[1] the persons described by subsection (2)(B) retain fewer rights to challenge a prior decree than are enjoyed by the non-parties described in subsection (1).

The rights preserved by subsection (2)(B) fall into two categories. First, there is the opportunity provided to all parties in Federal lawsuits to obtain relief under certain circumstances from a valid final judgment or order under Federal Rule of Civil Procedure 60.

In addition, a consent decree may contain terms setting out the procedures necessary for its own modification. If so, the court will ordinarily retain jurisdiction over the case to police such modifications.[2] By clarifying that subsection (1) does not pre-

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[1] *See, e.g., Martin* v. *Wilks*, 109 S.Ct. 2180, 2184 (1989).

[2] *See, e.g., United States* v. *American Cyanamid Co*, 719 F.2d 558, 563 (2d Cir. 1983).

clude parties from seeking such modifications, subsection (2)(B) merely preserves a right that all parties to Federal lawsuits enjoy—namely, the right to specify terms in a contract settling litigation. It bears emphasizing that, to the extent this right exists under current law, it is enjoyed equally by minorities and nonminorities.

Thus, I conclude that the terms of subsection (2)(B) do not favor minorities over nonminorities or vice-versa. Further, I see no reason to believe that it will have any invidiously discriminatory effect in practice.

Question. Your analysis of the constitutional status of section 6 is very enlightening. One of the witnesses before the committee questioned the constitutionality of section 15 regarding the application of the amendments and the transition rules. Likewise, the Department of Justice expressed an opinion that similar language contained in S. 1511 "appears to run afoul of the vested rights doctrine." (Letter Attached). Please share with the committee your analysis of the constitutional soundness of Section 15.

Answer. S. 2104, Section 15.

My written and oral testimony before the Senate Labor and Human Resources Committee focused on the constitutionality of section 6 of S. 2104. Senator Jeffords has also asked for my views of the constitutionality of section 15 regarding the transition rules implementing the substantive amendments of the remainder of the Act. Regrettably, my other commitments between now and mid-April make it impossible for me to address Senator Jeffords' question satisfactorily by March 26, 1990. I shall be glad to provide the committee with my analysis of section 15 in several weeks, after I have had an opportunity to study its provisions in detail.

Preliminarily, however, I am prepared to state that the issues raised by Assistant Attorney General Crawford in her January 25 letter to the committee regarding S. 1511 do seem quite relevant to section 15 of S. 2104. I expect to focus my research efforts on how the separation of powers principle enunciated in *United States* v. *Klein* [3] affects cases that uphold Congress' power to prescribe rules of decision retroactively.[4]

The CHAIRMAN. That was very responsive to many of the points which have been raised with regard to this particular provision.

Let me ask you, Professor Tribe—I know you oppose court-stripping legislation generally. Could you explain to us why S. 2104 is not court-stripping legislation?

Mr. TRIBE. Well, legislation of that kind, which would take from the U.S. Supreme Court the ability to resolve certain matters, it seems to me, is of a wholely different stripe. That just doesn't take away a day in court, it carves a whole issue out of the jurisdiction of the courts.

All this does is say that you cannot keep biting from the same apple. Basically, it says that if you have been notified and have chosen to sit on the sidelines, you are bound. And it says that if you were adequately represented, you are bound. But it does not suggest that there are black holes in the jurisdiction of the Federal courts, sort of areas that suck the Constitution in and snuff it out. I would certainly oppose it if I thought it had that effect, and it does not.

The CHAIRMAN. Senator Hatch.

Senator HATCH. The *Mullane* case was a trust case. It was a bankruptcy case—a probate case.

Mr. TRIBE. That's right, Senator.

Senator HATCH. You have equated probate and bankruptcy cases with equal protection and due process cases.

Mr. TRIBE. But equal protection——

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[3] 13 Wall. 128, 147 (1871).

[4] *See, e.g., United States* v. *Sioux Nation of Indians*, 448 U.S. 371 (1980). *See generally* P. Bator, D. Meltzer, P. Mishkin, D. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 105–106 (3rd ed. 1988).

Senator HATCH. Wait, let me just finish.

Mr. TRIBE. Sure.

Senator HATCH. I think equating employment discrimination cases with bankruptcy and probate proceedings is a pretty big step. I think it is terribly wrong.

I don't equate a creditor's claim that it is entitled to some bankrupt company's widgets with a claim by someone, white or black or whatever, male or female, that he or she is being denied equal protection of the laws.

Mr. TRIBE. Senator, might I respond to that?

Senator HATCH. Let me make one other statement and then, of course. Moreover, in my opinion, bankruptcy and probate proceedings are retrospective in nature, and they deal with real and personal property, to which title generally has to be determined. Employment cases basically affix future rights and impact on really the most fundamental of personal rights.

I have a great deal of regard for you as a human being and as a very clever and intelligent man, but I have real difficulties with that. And I just don't see how you can do that, to cite a 40 year-old case like *Mullane* to this proposition. There are others, I acknowledge, in probate and trust and environmental law that might stand for the proposition you are taking, but I don't know of any case that stands for it in the question of employment rights and equal protection rights. It is astounding to me. It is interesting to me.

Mr. TRIBE. Senator, might I respond to that?

Senator HATCH. Yes, please.

Mr. TRIBE. Justice Stewart some years ago made, I think, a very important point about this matter. He said property doesn't have rights; people have rights. And the current court, for all of my disagreement with it in some areas, I think, has very importantly awakened to the reality that just because the only thing that might be involved is property—a widow's pension, a welfare recipient's property, the interest of an old woman in the money that she might have inherited from her great-grandmother——

Senator HATCH. Or a million and a trust.

Mr. TRIBE [continuing.] Just because it is only property does not mean that equal protection and due process claims cannot arise with respect to it.

Senator HATCH. I agree with that, too.

Mr. TRIBE. They often do. And the point about *Mullane* which, though 40 years old, has been followed 400 or 500 times in every area of the law including employment, the point about *Mullane* isn't that trusts are special; the point about *Mullane* is that it states a kind of universal principle that when basic rights—and *Mullane* involved due process rates—are involved, you need a reasonable opportunity to be heard. You need notice. And if you have been given that opportunity, that is, if reasonable efforts to notify have been made, the fact that you personally may not have heard doesn't necessarily mean that the result cannot be binding.

Senator HATCH. What was the reasonable opportunity here?

Mr. TRIBE. Well, the reasonable opportunity here was that the lawyers were even present even before the fairness hearing when the consent judgment was being entered.

But I don't think it is even appropriate for this body to be acting as though it were reviewing a particular U.S. Supreme Court opinion. What you are doing is setting in place a framework for the future. And section 6 does specifically say that there must be a reasonable opportunity. If there isn't one, then that would be litigated, and section 6 would not be preclusive. If it didn't provide that safeguard, Senator, whether the area was bankruptcy or probate or anything else, I would oppose it.

But it seems to me that whatever the context—whether it is a job or a place in a housing project or a piece of family property—the rights that you have with respect to it under the United States Constitution should be fully protected by notice and an opportunity to be heard.

The procedural framework of the Constitution doesn't act in a kind of chameleon-like way, coming and going with particular areas as though somehow procedural due process means one thing when it comes to employment, and another when it comes to housing, and a third when it comes to probate. Sure, a job means more to people, many people, than money. Of course, a job means something partly because it gives you money.

The distinction between economic rights and human rights, I think, is very misleading. We are talking about human rights in the distribution of economic benefits in Birmingham.

Senator HATCH. I have to admit from the standpoint of argumentation, you might deserve a good C-plus.

Mr. TRIBE. I appreciate that.

Senator HATCH. As a professor, if a student gave you this answer with regard to fundamental, basic rights of employment and equal protection rights, you'd give them a D or an F. Now, I think you would.

Mr. TRIBE. Do you?

Senator HATCH. Now, be that as it may, you and I——

Mr. TRIBE. I guess we differ on that, Senator.

Senator HATCH. You and I do occasionally differ, I have to admit.

Mr. TRIBE. Right.

Senator HATCH. Let's assume for the moment that your analysis that direct notice, at least by mail, is all that the Constitution requires in an employment discrimination case for known, identifiable persons—now, even if I thought that that was all the process that we should give when such fundamental rights are at stake, I really find your wholely uncritical endorsement of section 6 of this bill surprising.

For instance, subparagraph (1)(A) states that if a person has "notice" from any source—any source—he or she can be precluded from a subsequent lawsuit challenging the consent decree.

Mr. TRIBE. Senator, you left out some key words. It says notice from any source "sufficient to apprise him that such judgment or order might affect his interest." That was what was so persuasive about Mr. Henson's testimony. He said he didn't have notice sufficient to apprise him. If that were true, this law wouldn't hurt him.

Senator HATCH. I presume that includes newspaper ads—does it?

Mr. TRIBE. If he has actual notice. If he actually knows.

Senator HATCH. Through newspaper ads?

Mr. TRIBE. I guess it doesn't much matter how he actually knows. That is, the courts have drawn a distinction of a formal sort between being served by a process server and learning some other way when you are being literally bound by a decree—for example, held in contempt for violating it. But when the four dissenters in *Martin* v. *Wilks* pointed out that no one was trying to enforce the decree affirmatively against people who weren't parties, the majority did not disagree with that.

The disagreement is really quite narrow. The disagreement in *Martin* v. *Wilks*, as Chief Justice Rehnquist made clear in footnote 2, was whether it was the proper job of the Court, as opposed to Congress, to provide a special scheme for dealing with employment cases.

And let me just if I might add one word about the employment context. It is very important to recognize that the fact that jobs are special cuts both ways. They are just as special to the blacks about whom it was determined that without this remedy, they would continue to suffer discrimination, as it is to the white firefighters who think they were not fairly treated. That is why, once you resolve the matter, it is important to be able to implement the decree.

The fact that jobs matter even more than, perhaps, trust funds is every bit——

Senator HATCH. Or bankruptcy.

Mr. TRIBE [continuing.] Or bankruptcy interests—is every bit as strong a reason to provide an end to litigation as it is a reason to make sure that we comply with procedural due process. And I do think that procedural due process has to be complied with.

But the language of this bill, even if you look—suppose you were right, Senator, that newspaper notice is not enough——

Senator HATCH. Well, you were arguing in *Mullane* that you had to have mail notice.

Mr. TRIBE. To those whose addresses you knew.

Senator HATCH. Wouldn't you think at least that would be a——

Mr. TRIBE. If you knew the address, you sure would need to do that I would think. The point is that——

Senator HATCH. Well, that isn't what this bill requires.

Mr. TRIBE. I'm sorry, Senator. With all respect, the bill does not say anything about mail or newspapers. It says if the Court determines that reasonable efforts were made to provide notice. Now, Congress doesn't usually specify in greater detail—although sometimes it may choose to—what reasonable efforts must be. What this bill does is leave to the courts the detailed elaboration of when it is enough to put it in the newspaper and when it's not.

Senator HATCH. But you say if a person is known, under *Mullane* they have to have a mail notice. But in this bill, that doesn't require that. You are saying that, well, it does require reasonable notice, so it really does require that, if his address is known, if his address is known.

Mr. TRIBE. Senator, under *Mullane* there was no statute. *Mullane* was simply a decision by the Court about due process. That is absorbed into the law. The Congress has never undertaken—it has a lot of work to do, as you know far better than I do—it has never undertaken in its busy schedule to spell out exactly when newspapers are enough, and when——

Senator HATCH. Oh, you ought to see what we do up here.

Mr. TRIBE. Well, I have seen the Internal Revenue Code; I know you do some things in detail.

Senator HATCH. But I'm talking about us up here. We can do that. We can actually say what is reasonable, and I think this does a lot to say that, and maybe it will in the end.

Mr. TRIBE. And you might choose to. But with respect to matters of procedure, often you do rely on the expertise of courts to figure out the details, and I think it is a reasonable judgment to do that here. That is, the key point about *Mullane* and the decisions applying it in more modern cases is that so many factors may go into the determination of what notice is reasonable, so many factors may be involved, that it is hard to codify in advance, and therefore you have to decide in all the circumstances whether it was sufficient to mail or to use the newspaper. And that is why in general Congress has not tried to lay down a detailed code in this area as it has in some others.

Senator HATCH. Well, let me make a few comments because I have to go to another meeting. I hate to leave because there is nobody I enjoy the law with better than you, and I think it may be because of the wide disparity of points of view that we both share. And I do have a great fondness for you and a great friendship for you. But let me just say a few things.

This bill adds compensatory and punitive damages and jury trials for intent cases that extends the statute of limitations from 180 days or 300 days to 2 years from the time that a person claims to have been impacted. This does not encourage, in my opinion, quick resolution or finality—that which you are arguing for with regard to these notice provisions—of disputes.

And all of these provisions, it seems to me, will discourage settlements and ensure protracted litigation—the things that you are arguing for, the things that this bill says, the bill for which you are arguing.

This bill also by overruling the *Evans* v. *Jeff* decision makes it tougher for employers to settle a case by making an offer of settlement that includes the plaintiff's attorneys' fees. That's just what this bill does, and I think that is terrible.

Let me just make a few more comments, because I am running out of time, and then I want to hear your response, too.

Mr. TRIBE. I understand.

Senator HATCH. You have said Mr. Henson had a day in court. But appearing at a fairness hearing, Professor Tribe, is just not the same as party status. He had two months' notice of the decree from a newspaper advertisement. He had virtually no right to discovery. He could not appeal an adverse ruling. And I hardly think that is giving him a day in court. Plus, aside from the due process issues, it seems to me that you and I, I think, would agree that we would prefer to bring a case of denial of equal protection at the time that our client loses his promotion.

So I don't equate the fairness hearing with a day in court or any real protected right in so many ways.

There are so many things I'd like to bring up. Let me bring up one more. Let's say a consent decree is entered in Boston by a multistate employer. And let's say that employer is in Salt Lake City

as well, where the aggrieved wrong occurs to your client. Or let's say some Salt Lake City attorney's client, and the employee want to challenge that consent decree, under the extremely limited opportunity to do so under this bill, he has to go to Federal Court in Boston; isn't that correct?

Mr. TRIBE. It is only correct that the suit must initially be brought there, but I don't think anything in this bill changes 1404(a), the change of venue provision. So I think a change of venue might still be available in your case.

Senator HATCH. Well, he'd have a right in almost every case to bring it right there in Salt Lake if he is aggrieved by the employer in that area.

Mr. TRIBE. Well, you have to make some decision about where you start these suits, but it seems to me that 1404(a) is the answer under 28 U.S. Code to any problem that might arise.

I didn't want to interrupt your other statements, but I do have views about each of those matters, and I would be happy when you have more time to explore them with you in whatever way would be helpful.

Senator HATCH. I'm sorry I do have to leave; I just hate to go.

Mr. TRIBE. I understand.

Senator HATCH. But let me just say this, Larry. I'd like you to really look at this as though you were retained on behalf of Mr. Henson—or without even Mr. Henson, but retained on behalf of any aggrieved parties that literally did not know they were going to be discriminated against in the end in what appears in Mr. Henson's case to be a grievous form of reverse discrimination.

There are much closer cases where the decision, it seems to me, would be much tougher to make. He is not saying he has to win in court, but he is saying, "I at least shouldn't be deprived because of a fairness hearing and a newspaper advertisement," when we had no idea that they were going to apply the consent decree in this particular fashion—until it actually came home to roost——

Mr. TRIBE. I am curious, though, Senator. The point that Mayor Arrington made, that never stops, does it? That is, every time any employment decision is made in Birmingham to implement this decree, somebody else might say, "Well, look, I was only 19 at the time; I was still just dreaming of becoming a firefighter," or "I was 7 years old," we relitigate the whole thing every time. So we never finish these matters.

Senator HATCH. Well, let's get back to your point that you would have to join every white firefighter in these suits.

Mr. TRIBE. And every possible firefighter; every 7 year-old who says, "Mommy, I'd like to become a firefighter." And that's not the way——

Senator HATCH. Not really. But you would have to join every existing firefighter. I don't see anything wrong with that. I mean, they know the addresses of every one of them; they know who they are. They certainly are part of that overall team. That is not a great big expense. That doesn't lead to protracted litigation.

Mr. TRIBE. But it puts terrible burdens on the firefighters who don't want to pay counsel costs at that point.

Senator HATCH. Now, let's be honest about that. They don't have to come in; they don't have to answer—and in most cases, they are

represented by counsel that represents the firefighters themselves——

Mr. TRIBE. But if they choose——

Senator HATCH [continuing.] Or they——

The CHAIRMAN. Let him answer the question or make the observation.

Senator HATCH. Well, I am trying to make a question. He knows what I am doing.

The CHAIRMAN. Well, he ought to be able to make a response, I think, without interruption.

Senator HATCH. He generally makes plenty of responses.

The CHAIRMAN. Well, when he gets a chance to.

Senator HATCH. You know, we do this every time. It is just a tradition.

Mr. TRIBE. I know. I love to watch it.

Senator HATCH. It is a ritual we go through. [Laughter.]

I think it is his way of letting me know that I'd just better tow the line every once in a while.

Mr. TRIBE. When I see bills that the two of you sponsor, I am particularly intrigued by how you manage to work that out. [Laughter.]

Senator HATCH. It is an intriguing process, let me tell you—one from which I have learned a lot, and I enjoy it.

Let me just say that as a friend, I am astounded by some of the arguments you are making. Again, I want to see the real Larry Tribe who really is concerned about equal protection and rights, and who is generally on that side—maybe not on the side of the white firefighters, but generally concerned about that as a major consideration—I'd like to see what arguments you'd make if you were on the other side of this case.

My point is this. I think we have to get rid of discrimination in this country, and we may need to implement some very strong remedies, and they may not always please everybody—and in the case of invidious discrimination and in certain other cases, they may even lead to certain aspects of reverse discrimination, as the Court has decided up to now. But they are very narrowly construed cases.

And here we have a case where it is hard for me to see my friend from Harvard arguing the side that you are arguing, based upon *Mullane*.

Mr. TRIBE. *Mullane* and the dozens of cases following on it. The principle is very basic. I think——

Senator HATCH. And almost all those apply to——

Mr. TRIBE [continuing.] I think you are seeing the real Larry Tribe. I hate to disappoint you, Senator.

Senator HATCH. Yes, you have disappointed me. Almost all of them apply to real property and personal property, which I think is important, and I think those rights are important, too, but they would hardly rise to the dignity of the rights of real human beings with regard to discrimination in employment.

But be that as it may, I wish we had more time. I had all kinds of questions I wanted to ask you, but thanks for coming.

Mr. TRIBE. Thank you, Senator.

Senator HATCH. I always enjoy it, and I hope to see you up there from time to time.

Thank you, Mr. Chairman.

The CHAIRMAN. Just to wind up, and then I'll recognize Senator Adams. As I and others who were involved in the drafting of the legislation understand—and I just want to conclude with these observations and get your reaction—there are a number of areas of the law in which the interests of persons who are not parties to litigation may be foreclosed with notice akin to that provided under our bill—you mentioned bankruptcy, probate, land title, and environmental proceedings. So if Congress could never adopt a remedial system such as those set forth in section 6 of our bill, the law would effectively be left with an open-endedness, which you have described with great detail. And as I understand from your own position, based upon decisions by the courts, which have been longstanding—Congress can make a judgment about the importance of finality—I think you mentioned, and Mayor Arrington did, particularly getting an aspect of finality with regard to issues which have, since the founding of this country, been as difficult and as painful as the issue of race relations. Is that correct?

Mr. TRIBE. I think it is correct. I think that Senator Hatch may be right that employment is important; race is important; environment is important. If there is some principle that when a matter is important, the country should never be allowed to solve it, even in accord with due process, then that is really a very novel principle indeed, and I think it would doom us to a very grave paralysis in dealing with all of these problems.

The CHAIRMAN. As to the status of the law at this current time in terms of the questions of due process—has the U.S. Supreme Court ever ruled that the due process clause requires that notice be given to persons whose interests are adequately represented by a named class member in a class action?

Mr. TRIBE. No, it hasn't, Senator. All the way back to *Hansberry*, when the Court first established the class action principle, it was clear that adequate representation when there are common interests is a substitute for individual notice. That is the whole idea of the class, and every circuit that I know of that has addressed the issue under rule 23(B)(2) has reached a similar conclusion.

I'm not saying one couldn't make a contrary argument, but the impact would be quite radical.

The CHAIRMAN. The supporters of the bill believe that reasonable notice should be decided by the Court in the particular circumstances of the case. In the *Mullane* case, there were a whole series of different individuals that were affected, and the Court drew conclusions about what was necessary notice for each of those various groups. But generally where the specific individuals can be identified, they should receive the notice by mail; where specific individuals who might be affected cannot be identified, publication of advertisements in widely circulated newspapers is often a constitutionally acceptable form of notice. I believe that was the result in terms of the *Mullane* decision, was it not?

Mr. TRIBE. Yes, it was, Senator.

The CHAIRMAN. OK. Senator Adams.

Senator ADAMS. Thank you, Mr. Chairman.

Professor Tribe, it is nice to see you again.

Mr. TRIBE. It is good to see you, Senator.

Senator ADAMS. I'll be very brief, Mr. Chairman, but I was concerned about the argument that was being made that consent decrees could be challenged and this "reasonable notice" standard.

Having been a Cabinet officer, I know the regulations and the things that Congress does in terms of detail, and that this fits the general way of establishing a system, and then if necessary, regulations can be used to implement it; isn't that correct?

Mr. TRIBE. It certainly is.

Senator ADAMS. And these consent decrees in the real world are generally not brought in a legal vacuum, isn't that correct? They receive rather widespread publicity and are generally brought by either trade organizations or rather large organizations, who inform their members in addition to the legal notice that is given.

Mr. TRIBE. Yes. I think it is very important to notice that in something like this Birmingham, Alabama situation it is almost an Alice-in-Wonderland picture to suggest that some people were less than informed, that they might have reason to be involved in the case.

These are, as you say, widely publicized cases, and if they weren't, if they were obscure star chamber proceedings, then the standard of this statute would not be met.

Senator ADAMS. Well, if we were to apply this type of test to a class action that Senator Hatch was mentioning, you could never depend upon finality in a class action suit, could you?

Mr. TRIBE. Not unless you had reached out in the most elaborate way to all sorts of people and in a way that might be economically prohibitive.

Senator ADAMS. And there is the right to file a challenge if you feel that you have been grossly overlooked or deliberately overlooked, isn't that correct?

Mr. TRIBE. Sure, and the statute makes an exception for collusive decrees, for example, so that if you say that there was a backroom deal of the kind that it was intimated, though I think falsely intimated, had gone on in Birmingham, then among other things the statute would not prevent challenges on the ground that there was collusion or fraud.

Senator ADAMS. Well, I think this provision is extraordinarily important because, as a former United States Attorney dealing with these kinds of cases, the object of the class action was to prevent multiple actions by multiple plaintiffs against multiple defendants and to get to a point of finality, so that if it were right or if it were wrong, it could then be determined up through the court system. Then you could move to the next step, either that the matter was wrongly decided or was rightly decided. But without finality, you can't ever get that determination at a higher level, can you?

Mr. TRIBE. That's right. And if the phrase of "everyone's day in court" means 300 million days multiplied by all the days that each appeal lasts, then we will be completely bogged down as a country.

Senator ADAMS. And class action suits would really, then, no longer be an effective way of deciding a major social issue within the courts, would they?

Mr. TRIBE. That's right. I think that the whole device would be gravely jeopardized if one accepted Senator Hatch's theory of due process.

Senator ADAMS. Right. Well, Mr. Chairman and Professor Tribe, what I am concerned about is that we are trying in this particular bill to correct, in this area, some procedural matters so that we can get some finality, so the courts can move on. I am concerned about cases circling up and back and up and back, and particularly with side procedural changes.

Now, if you have any suggestions, or if any of the other witnesses do as they go along, of a more definite standard—but do we not in many cases—not involving class actions, maybe, but in many cases—provide that the only notice anybody gets is a notice in the newspaper?

Mr. TRIBE. Sometimes. although there are constitutional problems with doing that——

Senator ADAMS. I understand.

Mr. TRIBE [continuing.] When you know exactly where they live.

Senator ADAMS. Oh, yes, if you are involved in collusion. But I'm talking about cases——

Mr. TRIBE. Even without collusion. If you know where someone lives and are content simply to put an ad in the *Washington Post*, that may not be enough under current constitutional standards.

Senator ADAMS. Oh, absolutely. But we use the newspaper as a method of getting general notice in a number of legal areas, probate and others, not just in this area.

Mr. TRIBE. Certainly, yes.

Senator ADAMS. The point I'm trying to make is that this is not unique to just this kind of litigation. What is in the bill is a well-known legal system of giving notice to large numbers of people who may be involved, and you may or may not know—I'm talking about heirs, for example, where you don't know whether they exist or not, or in Indian claims——

Mr. TRIBE. Or beneficiaries of a trust—large categories of people.

Senator ADAMS. Right.

Mr. TRIBE. Yes, it is a very standard method, and I see nothing wrong with it in principle.

Senator ADAMS. And for the same basic procedural reason, which is that you have to arrive at some point at a point of finality, and that if it is a gross error, the courts will generally allow a method of reopening. But the closure then shifts the burden significantly.

Mr. TRIBE. Correct, certainly.

Senator ADAMS. Good.

Thank you, Mr. Chairman. That's all I have.

The CHAIRMAN. Thank you, Senator Adams.

Thank you very much, Professor Tribe. We are delighted to have you.

Mr. TRIBE. Thank you.

The CHAIRMAN. My colleague Senator Hatch had to go to another meeting, but perhaps if there is something in the general sense as to the last statement he made, where there were different points, I'd invite you to make a response to that, which will be made a part of the record.

Mr. TRIBE. Thank you, Senator.

The CHAIRMAN. Thank you very much.

We have for our final panel three very able members of the legal profession—Thomas Barr, senior partner in Cravath, Swaine and Moore in New York, who is testifying on behalf of the Lawyers' Committee for Civil Rights. We are delighted to have you here.

We also welcome Glen Nager, a partner at the Washington office of Jones, Day, Reavis and Pogue; and Richard Larson, vice president of the Mexican American Legal Defense and Education Fund.

Mr. Barr, we welcome you. We know very well all the work you have done in these areas, as well as the Lawyers' Committee, which I will say a brief word about.

The Lawyers' Committee was formed as a result of a call from President Kennedy to the private bar to do more on the part of civil rights, and they have really met that challenge as a group, and you have as well. So we look forward to your testimony.

STATEMENTS OF THOMAS D. BARR, ESQ., SENIOR PARTNER, CRAVATH, SWAINE AND MOORE, ON BEHALF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, NEW YORK, NY; GLEN D. NAGER, ESQ., JONES, DAY, REAVIS AND POGUE, WASHINGTON, DC; AND E. RICHARD LARSON, ESQ., VICE PRESIDENT, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, LOS ANGELES, CA

Mr. BARR. Thank you, Mr. Chairman, and Senator Adams.

I am very grateful to have the opportunity to testify in support of the Civil Rights Act of 1990.

I am a trial lawyer with something more than 30 years of trial experience. I am not in any sense a constitutional lawyer. I am not a civil rights lawyer. I am just a trial lawyer who tries all kinds of cases, mostly in the Federal courts throughout the United States.

In view of the fact that Senator Adams is here, I will mention one of the recent cases, the suit by the Chemical Bank against the Washington Public Power Supply System, in which I represented the Chemical Bank, which was bond trustee on behalf of some 40,000 bondholders against something in excess of 250 defendants, which case was finally tried 2 years ago in Tucson and is still in the process of going through fairness hearings in order to distribute the $850 million of settlements that we achieved after three months of trial.

The issues such as those before you in this proposed legislation—joiner of parties and notice and fairness hearings, statute of limitations, finality of judgments and attorneys' fees—those are the kinds of things with which I am typically involved on a daily basis.

In the areas of antitrust, securities law, trade secrets, general commercial litigation, where all of these issues come into play all of the time, the law is pretty routinely settled, is followed pretty consistently throughout the United States, is relatively easy to understand and generally is interpreted in a way that carries out the basic fundamental purpose of the substantive statutes.

We all know, and we are all here because last term the U.S. Supreme Court of the United States in a series of 5–4 decisions decided a number of these procedural areas in ways that have the effect of limiting the substantive thrust of the civil rights law.

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I am not here to argue whether or not those decisions are right or wrong. Rather, I am here to say two things. First, I agree with many who have preceded me that those decisions have the effect, intended or not, of significantly limiting the reach of the civil rights laws in a number of ways. And second, I believe that the legislature has the authority and the responsibility to cure the procedural problems that the U.S. Supreme Court majority found, and thus make clear that the substantive reach of the civil rights laws should not be limited.

I'll speak briefly this morning about section 6 of the bill and the Court's 5–4 decision in *Martin* v. *Wilks*.

My firm represented the black firemen intervenors in that case and has since 1984. We came into that case after the Department of Justice switched sides and supported the white firemen intervenors. Last term, as we all know, the Court permitted a collateral attack on the consent judgment entered in 1981, which judgment was entered after two trials, in 1976 and 1979, and a consent judgment entered after notice and a fairness hearing.

Now, I have been through a lot of fairness hearings in a lot of courts throughout the United States, and believe me, those hearings are thorough and complete. There is often testimony, examination and cross-examination. Anyone, virtually, literally anyone, who wishes to be heard is heard, and heard often at tedious length. If the intervenors seek discovery, if they seek to find out something that they don't think they know, the courts will give them that authority. The typical district court judge is very unwilling to enter an opinion that says a settlement or a consent decree is fair unless he is thoroughly convinced that all aspects have been explored carefully and thoroughly by parties adverse as well as parties in favor.

Those hearings can go on for a very long time. In the *WPPS* case, which is what the plaintiffs' lawyers tended to call that lawsuit, that fairness hearing went on for some period of time, and the decision is not yet final, even though the trial portion of the case ended in December of 1988.

The basis for the court's decision was the conclusion that the intervening white firemen, of course from the same fire department, had not had their day in court, and therefore were not bound by the decision of the court approving the consent decree.

Now, "bound" is a word that you ought to be very concerned about. It is used to carry a lot of weight. If you say a party is not bound, or a party has not had his day in court, then you can look up a number of cases as precedent and say, well, for a party to be "bound", this must happen and that must happen, and you must be very careful in deciding whether or not a party is bound.

To me, what that means is that a party is required, may enforce the decree on his own behalf, or may have the decree enforced against him. Those are the parties that are bound to the decree.

There are many people, many persons, who are not bound but who are in fact affected by court judgments without actually ever being in court. We have talked about the examples that Chief Justice Rehnquist mentioned, particularly those in bankruptcy and probate matters, but it is also true in hundreds of cases throughout

the United States, in all areas, every day, in class actions and representative actions of various kinds.

My firm represented 40,000 different bondholders in the *WPPS* case. Obviously, we never saw any of those people. Some of those people, many of them, were large banks and insurance companies, but some people were also people who had put their life savings into those bonds and lost everything they had. They were retired people, they were sick people, they were people whose rights had been trampled as a result of the securities fraud in those cases, and they were as much concerned about their own welfare and their own position, and they felt as badly treated as anybody who feels he has been deprived of a job.

Judgments are made final and binding on persons not actually in court every day in the United States, through well-defined and well-understood procedures such as notice. Now, notice can often be—was often, in the WPPS case, for example—a very long document that elaborately informed the recipients of what was going on in the case, of how his rights might be affected, of how he should intervene if he chose to do so, of where he could get additional information, and on and on and on.

Notice issued by mail and through the media, under the supervision and at the direction of the court, is a conventional way of achieving finality of judgments, and large parts of the business of the court simply would not get done if those procedures were not followed.

The CHAIRMAN. Mr. Barr, I'm going to ask you if you might just summarize at this point, so we can give Mr. Nager and Mr. Larson some time.

Mr. BARR. I am sorry. I will turn, then, Senator—thank you—to say simply that the provisions in section 6 of the bill, which Professor Tribe has gone through at length, are in my view nothing more than normal, conventional methods of giving finality to a judgment. They are often applied, the same concepts, in many other kinds of cases, and I am sure they can be applied in this context in a workable manner and in a manner that is perfectly consistent with due process.

Thank you, Senator.

The CHAIRMAN. Very good. Thank you, Mr. Barr.

[The prepared statement of Mr. Barr follows:]

PREPARED STATEMENT OF THOMAS D. BARR

Mr. Chairman, members of the Committee, my name is Thomas D. Barr. I was admitted to the Bar in 1959 and have been at Cravath, Swaine & Moore as an associate and partner since then. I have been asked to appear in support of the Civil Rights Act of 1990, S. 2104, on behalf of the Lawyers' Committee for Civil Rights Under Law. One of my former partners, Bruce Bromley, was a founder of the Lawyers' Committee. I am and have been since 1968 a member of the Committee's Board of Directors, I served as a Co-Chairman of the Committee from 1977-1979, and one of my present partners, Robert Muller, is presently Co-Chairman and appears here with me.

My firm has worked with the Lawyers' Committee on a substantial number of cases over the years. I do not, however, claim any special expertise in the area of civil rights law or, for that matter, in any other area of substantive law. I am a trial lawyer involved in many different kinds of cases, not a specialist in any substantive area. As such, I am quite familiar with issues of practice and procedure in the federal courts, and I am here because these are the kinds of issues implicated by

many sections of the Civil Rights Act of 1990, including the sections involved in my testimony.

I support the enactment of the Civil Rights Act of 1990 in its entirety. I have been asked, however, to focus on certain portions of the Civil Rights Act of 1990 from the point of view of a trial lawyer in private practice. Those areas of the proposed legislation are:

1. Section 6 of the Act, entitled "Facilitating Prompt and Orderly Resolution of Challenges to Employment Practices Implementing Litigated or Consent Judgments or Orders." This portion of the Act addresses the Supreme Court's 5-to-4 June 12, 1989 decision in Martin v. Wilks, 109 S.Ct. 2180 (1989), on which my firm has been working since 1984 at the Lawyers' Committee's request. The Court held that a reverse discrimination claim could be used to collaterally attack a consent judgment entered by the court with the agreement of all parties after a full hearing and a clear determination by the Court of the fairness, reasonableness and adequacy of the consent judgment. The Court noted, however, that "where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants . . . legal proceedings may terminate preexisting rights if the scheme is otherwise consistent with due process". 109 S.Ct. at 2184 n.2. Section 6 of the Act is such a "special remedial scheme", combining both fairness, in the sense of

due process, and finality in employment discrimination litigation.

2. Section 3 of the Act, entitled "Statute of Limitations; Application to Challenges to Seniority Systems." This portion of the Act addresses the Supreme Court's 5-to-4 June 12, 1989 decision in Lorance v. AT&T Technologies, Inc., 109 S.Ct. 2261 (1989). I had no personal involvement with this case, but the issue involved arises with some frequency in other areas of the law and concerns whether the statute of limitations should begin to run when the wrong is committed or when it was or should have been discovered by an aggrieved party. Sometimes a wrong may have been committed long before the person harmed could know he or she was harmed, such as exposure to a toxic substance or fraud or other deception concealed when committed. For technical reasons, the Court in Lorance concluded that the statute of limitations for a discrimination claim against a seniority system runs from the time when the seniority system was adopted rather than from the time its alleged discriminatory impact became known. Section 7 makes it clear, contrary to Lorance, that Congress did not intend that the statute of limitations would run out before a plaintiff could know of an employment discrimination claim. Section 7 is therefore also consistent with the modern view of when a plaintiff is chargeable with notice of a claim,

such as, in other areas of the law, when damages due to a toxic substance is discovered or when concealed fraud is first discovered.

3. Section 9 of the Act, entitled "Clarifying Attorneys' Fees Provision". This portion of the Act addresses, among other things, the Supreme Court's decisions in Independent Federation of Flight Attendants v. Zipes, 109 S.Ct. 2732 (1989), and Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 107 S.Ct. 2494 (1987). Again, I had no personal involvement with these cases, but they concern issues with which I am quite familiar:

> first, the need to provide for the right to apply for attorneys' fees when a party seeking the protection of the employment discrimination laws is successful on the merits, including resisting contentions made by an intervenor or having to intervene to defend anti-discrimination results previously achieved; and
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> second, the need to provide for the right to apply for expert witness fees when a party seeking the protection of the employment discrimination laws is successful on the merits.

Zipes casts doubt on the right to apply for attorneys' fees in the context of defending relief against attack. But the right to attorneys' fees for successful work should not depend on whether intervention is involved,

since Congress has plainly granted the successful anti-employment discrimination plaintiffs the right to apply for attorneys' fees when they prevail generally. When Congress has deemed it essential to provide for effective private enforcement of federal laws, Congress has repeatedly authorized payment of attorney's fees to a successful lawyer, also frequently referred to as a "private attorney general". The happenstance that an employment discrimination issue may arise in the context of intervention, as opposed to some other context, should make no difference in the right to make an application for an attorney's fee for the prevailing party. Section 9 of the Act accomplishes that result.

Similarly, Crawford Fitting casts doubt on the ability of the successful employment discrimination plaintiff to apply for expert witness fees. In many employment discrimination cases, expert testimony is absolutely essential. Without it, plaintiffs will frequently be unable even to make out a prima facie case. Yet, $30 per day is the only cost recoverable for an expert witness if his or her fee is otherwise disallowed. No one can retain an expert on any matter for $30 per day and, for all the reasons which support recovery of an attorney's fee for the successful plaintiff in an employment discrimination case, the right to apply for an expert witness fee is critical. Section 9 of

the Act confirms that such fees are recoverable in employment discrimination cases.

It is important to underscore here that all Section 9 provides for is the right to apply for a fee. Section 9 does not mandate the award of any fee or any particular amount of a fee. All of that may be challenged by the other party and is completely subject to court approval as to the reasonableness of the fee.

4. Section 15 of the Act, entitled "Application of Amendments and Transition Rules". These are necessary provisions designed to apply those provisions of the Act I have mentioned and others to proceedings commenced on or after the relevant Supreme Court decisions which the Act redresses. Congress frequently makes legislation of this type retroactive, and plainly has the power to do so to correct or clarify its intent as to prior legislation affected by an intervening Supreme Court decision. Claims arising before the effective date of the Act, or claims extinguished from the date of the Supreme Court decision but before the effective date of the Act, should not in all equity and fairness be governed by a different set of rules than claims arising after the effective date of the Act. The Supreme Court has several times affirmed the authority of the Congress under the Constitution to do what is set out in Section 15 of the Act.

I will discuss in some additional detail why, from my point of view as a lawyer in private practice, Congress should enact the provisions of the Civil Rights Act of 1990 which I have focused upon in my testimony.

I. Section 6 of the Civil Rights Act of 1990

The amendments contained in Section 6 of the Civil Rights Act of 1990, entitled "Facilitating Prompt and Orderly Resolution of Challenges to Employment Practices Implementing Litigated or Consent Judgments or Orders", address the holding of the Supreme Court in Martin v. Wilks, 109 S.Ct. 2180 (1989). In Martin, the Court held that a person adversely affected by a consent decree could not be precluded from filing a separate lawsuit challenging the decree unless that person had been made a party to the consent decree action - even if that person had previously had an opportunity to be heard by the court prior to the entry of the decree.

(a) Martin v. Wilks

Martin started in January of 1974 as a lawsuit by the Lawyers Committee on behalf of black employees of, and applicants for employment with, the City of Birmingham, Alabama. The plaintiffs claimed that the City of Birmingham discriminated against them on the basis of race in hiring and promotions in the fire department and in many other

departments in the City. Following in the Committee's footsteps, in May of 1975 the United States Department of Justice filed a similar lawsuit alleging both race and sex discrimination against blacks and women. At two trials in 1976 and 1979 the Justice Department and the Lawyers' Committee submitted extensive evidence showing discrimination on the basis of race and sex against blacks and women in hiring and promotions.

The 1976 trial resulted in findings, inter alia, by the court that the test used by the City to hire firefighters discriminated on the basis of race against blacks. After massive evidence of promotional discrimination was adduced in the 1979 trial, the Justice Department and the Lawyers' Committee proposed consent decrees with the City of Birmingham and the County's personnel board in May of 1982. Prior to the entry of the decrees, all interested persons affected by the decree were notified by publication of their opportunity to be heard by the court. At a fairness hearing before the entry of the decree, the Judge heard from the Birmingham Firefighter's Association which represented the interests of white firefighters, and objected to the affirmative action provisions of the decree. However, the Judge found the consent decree fair, reasonable, and adequate.

Starting in April of 1982, prior to the first promotion of any blacks in the history of the Birmingham Fire Department, white firefighters collaterally attacked the decree claiming "reverse discrimination". Then, without warning, the Justice Department, who had negotiated the decree on the side of the plaintiffs, switched sides, joining in the attack on the decree, despite the express obligation that all parties to the decree, including the Justice Department, "individually and jointly defend each remedial measure in the event of challenge by . . . any other party who may seek to challenge such remedial measures through intervention or collateral attack". See Consent Decree With Jefferson County, p. 4; Consent Decree with the City of Birmingham, p. 4; Consent Decree with Jefferson County Personnel Board, p. 4. It was at this point that the Committee requested that Cravath, Swaine & Moore assist in defending the decree against the Justice Department.

(b) Impermissible Collateral Attack

Putting both the Martin decision and the issues it creates into perspective, everyone agrees that people whose rights may be affected by civil rights litigation should have a fair opportunity to participate in the process prior to entry of any decree. Instead, the issue raised by the decision in Martin is whether there should be reasonable and orderly procedures, such as those contained in this legis-

lation, for this participation so that the process for achieving a resolution and defending that resolution is not interminably prolonged. As recognized by the Supreme Court in Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982), a central principle in our legal system is that a person deserves his or her day-in-court, but this principle is meaningless without a second, equally important principle--that of finality of judgments. Id. at 478.

Martin threatens to lead to renewed litigation over any and every consent decree and litigated order where persons claim they were "adversely affected", no matter how much time has passed since the original lawsuit and no matter how many chances the "adversely affected" persons had to participate in the original lawsuit. Prior to the Martin decision, the Supreme Court recognized that "the great majority of the federal courts of appeals" had forbidden collateral attacks on consent decrees. Martin, 109 S.Ct. at 2185. Moreover, Martin contradicts Title VII's purpose of encouraging voluntary compliance and preference for settlement of employment discrimination lawsuits by holding out the likelihood of interminable litigation and exposure to multiple liability even after settlement. Martin also

destroys the vital concept of finality of litigation. 1/ Instead, the courts, already overburdened, face increasing dockets with lawsuits seeking to re-litigate claims already heard. 2/ Employers groups representing every level of public and private employers had urged the Court not to adopt the rule announced in this decision because of its disruptive impact on the process of correcting past discrimination. 3/ The decision in Martin places employers

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1/ As noted by the Court in Kremer, if finality is stripped from judicial decisions the quality of adjudication is attenuated by lessening the incentive for full participation by the parties and by lowering the motivation for searching review by government officials. 456 U.S. at 478.

2/ The Lawyers' Committee has conducted a study of the aftermath of the Supreme Court decision in Martin (attached hereto as an appendix). This study demonstrates that the impact of the Martin decision is clear: Long-settled cases are being reopened to the prospect of perpetual litigation in communities throughout the country. Dozens of cases are now clogging the courts, challenging court orders because of Martin v. Wilks. After years of litigation which finally produced racial progress, city after city is facing the trauma of reopening old wounds.

3/ In an amicus brief filed in Martin, the Equal Employment Advisory Counsel, a nationwide association of employers, predicted that the decision ultimately reached in Martin would "seriously affect the utility of consent decrees as a means of resolving class claims of discrimination in employment, since much of the incentive to an employer to enter into such a decree would be destroyed if the employer were left vulnerable to subsequent lawsuits by persons or groups claiming that the employer's compliance with the consent decree constituted discrimination against them". Brief Amicus Curiae of the Equal Employment Advisory Council in Support of the Petitioners, p. 3.

in the hopeless position of having to choose between compliance with a consent or litigated decree, and the extended litigation and exposure to multiple liability which Martin permits--or noncompliance, which subjects them to both civil and criminal contempt penalties. Clearly, this situation is untenable and cannot be allowed to continue.

The amendments proposed in section 6 of the Act will correct the holding of Martin by striking a careful balance between the interests of those affected by a litigated or consent judgment, the parties to that judgment, and the court, insuring all interests are protected in a timely and orderly fashion. The legislation protects the rights of persons affected by employment discrimination litigation in the following key respects:

1. Full rights of intervention in the employment discrimination litigation are preserved. Thus, a person could intervene in the original case and participate fully whenever a court considers that is appropriate. The legislation maintains the sensible pre-Martin option for the non-party to decide whether to join the lawsuit, rather than force the parties to attempt to join additional persons.

2. In order to ensure that the rights of affected persons are protected, the legislation

provides notice and an opportunity to be heard by the court to interested persons and/or adequate representation of a person's interest before precluding collateral attack on the decree.

3. Even where such notice has been given, persons can still file separate lawsuits even after the entry of the decree to claim that the decree was a product of collusion or fraud, is transparently invalid or was entered by a court which lacked subject matter jurisdiction.

The legislation protects the interests of the parties and the courts in certainty and finality by barring repeated post-decree lawsuits over matters already litigated, where the fair and orderly procedures outlined above are followed. The legislation also avoids inconsistent results and promotes judicial efficiency by mandating that lawsuits challenging court orders be brought in the court, and if possible, before the judge, that entered the order.

United States Deputy Attorney General Ayer has expressed concern about the constitutionality of portions of the provisions of Section 6 of the Act. However, I believe that the proposed amendments provide a sufficient opportunity for those persons potentially affected by a Title VII decree to participate in the litigation and/or

framing of the decree, so that preclusion of collateral attacks on a decree by those persons adversely affected by the decree comports with procedural due process.

The provisions contained in Section 6 are routine procedures found in many areas of law. See National Labor Relations Board v. Bildisco & Bildisco, 465 U.S. 513, 529-30 n.10 (1984) (bankruptcy proof of claim precluded unless filed before reorganization is confirmed); Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1988) (under probate law, creditors precluded from filing claims after probate proceedings commenced); Resource Conservation and Recovery Act, 42 U.S,C. § 7604(b) (1982) (citizens precluded from bringing private civil action for violation once government commences action). The amendments proposed in Section 6 of the Act are an application of these procedures to civil rights actions. As stated by Chief Justice Rehnquist in Martin, Congress has the power to fashion a "special remedial scheme . . . expressly foreclosing successive litigation by non-litigants . . . [which] may terminate pre-existing rights if the scheme is consistent with due process". 109 S.Ct. at 2184 n.2.

Section 6 is a proper constitutional exercise of this power for these reasons:

First, Section 6 seeks to amend Title VII to protect orders or judgments from collateral attack by

persons who, prior to the entry of the order or judgment, had "notice from any source of the proposed judgment or order sufficient to apprise such person that such judgment or order might affect the interests of such person", and, such person had "a reasonable opportunity to present objections to such judgment or order". Certainly, this provision, by providing notice and an opportunity to be heard, satisfies the most expansive view of procedural due process. See Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314-15 (1950); Mathews v. Eldridge, 424 U.S. 319, 333 (1976).

Second, Section 6 seeks to preclude collateral challenges from those persons whose interests "were adequately represented by another person who challenged such judgment or order prior to or after the entry of such judgment or order". This is merely an incorporation of the language used by Chief Justice Rehnquist in Martin, in which he stated that the requirements of due process could be satisfied, and a collateral attack precluded, if "a person, although not a party, has his interests adequately represented by someone with the same interests who is a party". 109 S.Ct. at 2184 n.2 (citations omitted).

Third, Section 6 seeks to protect orders and judgments from collateral attack when "the court that entered the judgment or order determines that reasonable

efforts were made to provide notice to interested persons". This provision clearly fulfills the due process requirements set out by the Supreme Court in Mullane. There the Court held that finality could be accorded proceedings if there was "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections". 339 U.S. at 314 (citations omitted)(emphasis added). This is the same basis on which absent members are bound in class action litigation. Section 6 applies this well established principle to actions under Title VII.

The amendments proposed in Section 6 of this legislation provide maximum flexibility to district court judges to use their sound discretion to require whatever due process is necessary, given the particular facts of each case. Of course, this determination is reviewable by an appellate court. In total, these amendments accommodate both the policy of finality and the right to be heard, while restoring needed stability to employment discrimination law.

II. Lorance v. AT&T

I next will address section 7(a) of S. 2104, which corrects the Supreme Court's holding in Lorance v. A.T.&T. Technologies, Inc., 109 S.Ct. 2261 (1989). In Lorance, the

Court denied women the right to pursue a claim of discrimination against a seniority plan which, although facially neutral, was allegedly adopted with the intent to discriminate against women. Although the plaintiffs were not adversely affected by the plan until 1982, the Court concluded that the statute of limitations period began to run on their claims upon the adoption of the plan in 1979. In essence, the Court required the employees to anticipate future adverse applications of the system, no matter how speculative or unlikely the application might be, and to initiate suit on that basis, whether or not they would have had standing to challenge such a practice at the time it was adopted.

Section 7(a) corrects the ruling in Lorance by amending Section 706(e) of Title VII, re-establishing that the statute of limitations period for Title VII does not commence until the unlawful practice occurs or the concrete effects of the injury are felt by the charging party, whichever is later. This change is directly analogous to statutes in the toxic tort area, which provide that the statute of limitations does not begin to run until a person discovers his or her injuries have been caused by a toxic chemical. See, e.g., N.Y. Civ. Prac. L. & R. § 214(c) (1986). Simple fairness requires that a statute of

limitations not begin to run until a person knows that he or she has been harmed.

The Act also extends the statute of limitations period under Title VII to two years, rather than the current 180 days. This is necessary because Title VII's existing statute of limitations period for filing charges, while intended to encourage prompt resolution of discrimination claims, has in practice hampered such resolution. This is because Title VII has an exhaustion requirement which, in combination with the short statute of limitations means that many potentially meritorious claims are time barred. Two years is a common statute of limitations for a § 1981 claim, and brings the statute of limitations in line with the remedy provisions of Title VII.

III. Section 9 of the Civil Rights Act of 1990

Section 9 of the Act, entitled "Clarifying Attorneys' Fees Provision", proposes amendments to the provisions of Title VII of the Civil Rights Act of 1964 that enable a prevailing plaintiff to recover attorney's fees and costs from a defendant. It should be noted from the outset that none of the provisions contained in this Section alter the basic procedures for recovery of these fees. That is, none of the proposals alter the fact that plaintiffs must apply to the court for any recoverable fees, that it is within the

court's discretion to award such fees and to determine the particular amount, and that the entire process is subject to challenge by an opposing party and to appellate review. I will divide my discussion of this Section into two areas: (1) the negative impact of the decision handed down by the Supreme Court in Independent Federation of Flight Attendants v. Zipes, 109 S.Ct. 2732 (1989), on the recoverability of attorney's fees in civil rights litigation, and (2) the necessity of an expert fees provision for claims brought under the Civil Rights Act of 1964.

Subsequent to its holding in Martin v. Wilks, 109 S.Ct. 2180 (1989), the Court decided Independent Federation of Flight Attendants v. Zipes, 109 S.Ct. 2732 (1989), in which it held that plaintiffs could not recover attorney's fees against an intervening party which had multiplied the proceedings in a Title VII claim unless the intervention was frivolous or vexatious. The Court also suggested that fees for resisting the intervention might not even be recoverable by the plaintiff against the employer. Finally, though the issue was not presented by the case, the Court surprisingly stated that, because of its decision in Martin v. Wilks, Title VII plaintiffs defending consent decrees in collateral lawsuits "have no basis for claiming attorney's fees" against anyone in such lawsuits.

If not corrected, the Martin decision will expose the victims of discrimination to a virtually endless stream of litigation defending consent decrees from claims of "reverse discrimination", while the Zipes decision may effectively deny these victims recovery of the resulting attorney's fees. In addition, if an adverse party chooses to intervene in plaintiff's Title VII action, and plaintiff cannot prove that this intervention is frivolous or vexatious--a very difficult showing--attorney's fees for work in defending against such interventions may also be in jeopardy.

This result clearly contravenes the intent of Congress in allowing recovery of attorney's fees in Title VII actions. Recovery of attorney's fees is intended to attract competent counsel to represent victims of civil rights violations so that these victims could fulfill their role in the federal enforcement scheme as "private attorneys general", vindicating the public interest. By restricting the ability of plaintiffs to recover attorney's fees, Zipes, in conjunction with Martin, raises the prospect that plaintiffs will not be able to attract ready and willing counsel to present their claims. The result is that private enforcement of Title VII, which includes most such litigation, will be severely impacted. As stated by Justice Marshall in his dissent in Zipes, because of the Court's

decision "many victims of discrimination will be forced to forgo remedial litigation for lack of financial resources. As a result, injuries will go unredressed and the national policy against discrimination will go unredeemed." 109 S.Ct. at 2746 (Marshall, J., dissenting).

Section 9 of the proposed amendments corrects the Zipes decision by restoring the district court's discretion to award to the victim of discrimination who prevails in the original action attorney's fees reasonably incurred in defending such judgment or order as a party, intervenor, or otherwise. It responds to the reality that most plaintiffs will be unable to find lawyers willing or able to prosecute civil rights cases without compensation for the extensive additional work necessary to defend the relief obtained from subsequent attacks. Without such defense, the relief secured is unlikely to be maintained.

Next I would like to discuss how Section 9 affects the recovery of expert witness fees by a prevailing party under Title VII. In Crawford Fitting Co. v. J. T. Gibbons, Inc., 482 U.S. 437, the Court limited the expert witness fees recoverable by a successful party to $30 per day for each day that the witness appeared in court. The Court stated that "absent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witnesses as costs, federal courts are bound by" this

statutory limitation. 482 U.S. at 445. Several courts have construed this language in the Title VII context to prohibit awarding a prevailing party expert witness fees in excess of $30 per day. See, e.g., Catlett v. Missouri Highway and Transportation Commission, 828 F.2d 1260, 1272 (8th Cir. 1987), cert. denied, 485 U.S. 1021 (1988); Denny v. Westfield State College, 880 F.2d 1465, 1471 (1st Cir. 1989), petition for cert. filed, (Jan. 29, 1990) (No 89-1230). As the Denny court stated, "[f]ailing the discovery of some tangible, reasonably explicit indication of congressional intent that witness fees be shifted without regard to the $30-per day cap, the Crawford rule must prevail."

At the same time, other federal courts have refused to apply Crawford in cases involving fee-shifting provisions identical to Title VII's. See, e.g., Friedrich v. City of Chicago, 888 F.2d 511 (7th Cir. 1989)(Posner, J.), petition for cert. filed (Jan. 29, 1990)(No. 89-1230); United States v. Yonkers Board of Education, 118 F.R.D. 326, 330 (S.D.N.Y. 1987)(Sand, J.).

Application of Crawford to limit recovery of expert witness fees to $30 per day only for time spent in court has already had and will continue to have devastating effects on Title VII litigants. For example, the prevailing plaintiffs in one Title VII case in Mississippi currently

has over $20,000 in expert witness fees which are in jeopardy as a result of Crawford. Although the Denny court felt forced to deny recovery of the plaintiff's expert witness fees, it commented that "'[i]t is widely recognized that statistical evidence can be a valuable tool for proving or disproving employment discrimination.' Experts' costs, if not shifted, can operate as a significant disincentive to would-be enforcers. Surely, Title VII will be a less effective ameliorative if victims of proven discrimination are compelled to swallow the often sizable fees of testifying experts." Denny, 880 F.2d 1465, 1471-72 (quoting Chang v. University of Rhode Island, 606 F.Supp. 1161, 1188 (D.R.I. 1985))(emphasis added). Cf. West Virginia University Hospitals, Inc. v. Casey, 885 F.2d 11, 34 (3d Cir. 1989) (similar conclusion with respect to 42 U.S.C. § 1988), cert. granted, 58 U.S.L.W. 3545 (Feb. 26, 1990)(No. 89-994); Knop v. Johnson, 712 F.Supp. 571, 589 (W.D. Mich. 1989).

The existing fee-shifting provision of Title VII reflects the economic disparity between typical Title VII plaintiffs and defendants. Clearly, if expert witness testimony is so crucial in Title VII cases, then there is no excuse for refusing to allow expert fees to be shifted along with other litigation expenses. "[The parties seeking expert witness fees] note the crippling effect [that a

$30 per day] limitation would have on civil rights suits in which the defendant has far greater resources in litigation [and] in which expert testimony is often a critical factor." United States v. Yonkers Board of Education, 118 F.R.D. 326, 330 (S.D.N.Y. 1987).

Section 9 of the Act answers the Supreme Court's request in Crawford for "plain evidence of congressional intent to supersede" the $30 per day statutory limitation. 482 U.S. at 445. Even after this modification, expert witness fees will be awarded only to prevailing Title VII litigants, and the total amount awarded will continue to be limited to that which the court determines is "reasonable". The proposed amendment will not increase the amount of attorney's fees collected at all. By shifting the expenses of experts to the unsuccessful party, however, it will allow litigants to provide to the court the expertise necessary to prove their case. This type of explicit shifting of expert fees is nothing new: there are at least twenty-eight federal statutes which provide for prevailing parties to collect both reasonable attorney's fees and reasonable expert witness fees. 4/ Particularly in light of the number and

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4/ See International Woodworkers of America v. Champion International Corp., 790 F.2d 1174, 1179 n.7 (5th Cir. 1986)(companion case to Crawford). The statutes range from the Consumer Product Safety Act, 15 U.S.C. §§ 2060(c),

variety of these statutes, there is every reason for Congress explicitly to authorize awards of expert fees to prevailing parties under Title VII.

IV. Section 15 of the Civil Rights Act of 1990

Finally, I will address the effective dates of the provisions contained in Section 15 of the Act, entitled "Application of Amendment and Transition Rules". The Civil Rights Act of 1990 contains a number of provisions to be given retroactive effect. These provisions would apply in some instances to proceedings pending on or commenced after the date on which the Supreme Court issued an opinion misinterpreting Congress' intent in enacting Title VII or section 1981, or in other instances to all cases pending on the date of enactment of the Act. (Section 15(a)). In addition, the transition rules provide that any order inconsistent with the Act entered by a court between the effective date of each retroactive provision and the date of enactment of the Act shall be vacated if a request for such

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2072(a) and 2073, to the Hazardous Liquid Pipeline Safety Act, 49 U.S.C. § 2014(e). The list also includes the Petroleum Marketing Practices Act, 15 U.S.C. § 2805(d)(3), the Deep Seabed Hard Minerals Resources Act, 30 U.S.C. § 1427(c), the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(A), and the Noise Control Act of 1972, 42 U.S.C. § 5851(e)(2).

relief is entered within one year from the enactment of the Act. (Section 15(b)).

The retroactive application of civil legislation is routine and presumptively proper. Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974). Congress may also create a remedy years after the fact, even though litigation which would have occurred earlier would not have been successful. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976). Congress may create new obligations, such as for the payment of attorneys' fees, and apply the new obligation to cases which have been pending for years. Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974).

The power of the legislature to enact retroactive legislation which contracts and/or expands substantive rights and remedies can be seen by comparing legislation in the military contractor area with that regulating toxic torts. For instance, in In re Consolidated United States Atmospheric Testing Litigation, 820 F.2d 982 (9th Cir. 1987) cert. denied sub nom., Konizeski v. Livermore Labs, 485 U.S. 905 (1988), the Ninth Circuit upheld the retroactive application of a federal statute substituting the United States as the defendant in all suits against private contractors to the government for radiation injuries arising out of United States atomic weapons testing programs, and

making the Federal Tort Claims Act the sole remedy for those injuries. The Ninth Circuit Court of Appeals held the statute to be constitutional even though the statute curtailed the scope of the available remedy in numerous pending cases and extinguished many "vested" causes of action altogether.

Similarly, in 1986 New York State amended its statute of limitations for toxic tort claims. It replaced the long standing date-of-injury rule with a three year statute of limitations that begins to run when the injury is discovered. See CPLR § 214-c. The new legislation included a provision which revived, for a period of one year, causes of action which had previously been time-barred. See L. 1986, ch. 682, § 4. In Hymowitz v. Eli Lilly & Co., 73 N.Y.2d 487, 541 N.Y.S.2d 941 (1989), cert. denied , 110 S.Ct. 350 (1989), the New York Court of Appeals explicitly upheld the constitutionality of the revival statute, on both federal and state constitutional grounds. By so doing, the court permitted the commencement of actions already time-barred under the old statute of limitations, perhaps by decades, and thereby allowing an "injustice [to be] rectified". Hymowitz, 73 N.Y.2d at 541 N.Y.S.2d at 951.

If the 1990 Civil Rights Act is not applied retroactively, claims filed before the effective date of the Act will be subjected to treatment different from those

claims filed on or after the effective date of the Act. Given that the effective date of the Act will be arbitrary, such a result would be patently unjust. Where, as here, the Supreme Court has misinterpreted the intent of Congress and Congress is now clarifying in the Civil Rights Act of 1990 what its intent is and always was, it is only logical and equitable to apply Congress' original intent to all claims pending on the date of or filed after the erroneous Supreme Court interpretation. In fact, one court has stated that "'[c]urative' legislation such as this, which is designed to cure what Congress perceived as a defect in prior law, is entitled to particular deference." Counsel v. Dow, 849 F.2d 731, 738-39 (2d Cir. 1988), cert. denied, Connecticut v. Counsel, 109 S.Ct. 391 (1988).

In the past, in cases in which Congress has considered the Supreme Court's interpretation of a federal civil rights statute to be incorrect, it has acted to change that interpretation retroactively. A number of reported federal cases have dealt with the retroactive provisions for attorneys fees in the Education of the Handicapped Act ("EHA"), § 615(e)(4), (e)(4)(B-D), as amended, 20 U.S.C.A. § 1415 (e), (e)(4)(B-D)D. The EHA overturned the Supreme Court decision in Smith v. Robinson, 468 U.S. 992 (1984), which had held that attorney's fees were not available under the Act. Section 5 of the amendments to the Act stated that

the attorney's fees provision "shall apply with respect to action or proceedings brought under . . . [the Act] after July 3, 1984, and actions or proceedings brought prior to July 4, 1984 [the date Smith was decided], . . . which were pending on July 4, 1984." 20 U.S.C. § 1415(e)(4)(B) (1986), cited in Tonya v. Board of Education of City of Chicago, 847 F.2d 1243, 1245 (7th Cir. 1988) (Easterbrook, J.). This provision has been upheld in response to arguments that it violates the constitutional structure of separation of powers. See Tonya, 847 F.2d at 1247; School Board of Prince William County v. Malone, 662 F. Supp. 999, 1000 (E.D. Va. 1987). In Malone, the court specifically upheld the statutory provision against a separation of powers challenge because it did not prescribe a rule of decision in a pending case, nor obligate the court to decide a controversy in the government's favor, but rather the law was changed generally. Malone, 662 F. Supp. at 1000.

Retroactive application of legislation has been held constitutional by the Supreme Court in response to a separation of powers challenge. In United States v. Sioux Nation of Indians, 448 U.S. 371, 392-93 (1980), the Supreme Court held that retroactive legislation was not a violation of separation of powers as long as such legislation did not prescribe the result of a court's decision. Sioux Nation, 448 U.S. at 398. The Court upheld special legislation which

allowed the Court of Claims to hear a dispute over the alleged taking of land granted the Sioux Nation by treaty, notwithstanding the fact that the issue had been previously adjudicated. Id. at 406. The core of the Court's analysis was that as long as retroactive legislation does not prescribe a particular result in future litigation, it will be upheld against separation of powers challenges. Id. at 404. Since the Civil Rights Act of 1990 does not prescribe particular results in future litigation, it is not a violation of the constitutional structure for separation of powers.

Finally, retroactive legislation has been upheld against Fifth Amendment challenges. In Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 18 (1976), the Court approved legislation that required employers to pay benefits to miners who had left employment in the industry prior to the effective date of the Act. The Court held that the statute did not violate the due process clause, finding that "the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor". Usery, 428 U.S. at 18. Similarly, S. 2104, the reinstatement of earlier prevailing laws to discriminatory acts performed in the past, is justified as a rational measure to spread the

costs of discriminating against employees to those who have profited from the fruits of their labor and to those who actually created the costs of discrimination.

Conclusion

In summary, I would like to reiterate my support for the S. 2104; the legal and constitutional concerns expressed by others are, in my view, unfounded. The Bill's purpose and provisions merely return us to well-established principles of law.

The CHAIRMAN. Mr. Nager.

Mr. NAGER. Thank you, Mr. Chairman.

My name is Glen Nager, and I am a partner in the firm of Jones, Day, Reavis and Pogue. I practice primarily in the area of labor and employment law. From 1986 to 1988 I was an assistant to the Solicitor General in the Department of Justice, and both at the Justice Department and in my capacity at Jones, Day, I have had the opportunity to file briefs and make oral arguments regarding many of the issues addressed by this bill. I appreciate the opportunity to testify before you today.

I join with those who have testified against many provisions of this bill. I do agree that certain corrections to the law should be made to deal with specific decisions rendered by the U.S. Supreme Court last term. But in agreeing that certain corrections are necessary, I disagree quite strongly with Professor Tribe, who suggests that the Court has cut back on civil rights.

What the Court has done in all of those cases is attempt to interpret statutes, and if this body is not satisfied with what previous Congresses have done, then of course it is entitled to make corrections. And what I would like to do today is testify as to why some of the corrections being currently considered are both bad policy and potentially unconstitutional.

I'd like to start with section 6. Section 6 purports to estop an individual from challenging an action that under the words of the bill "implements" a consent decree. That goes way beyond what was at issue in *Martin* v. *Wilks*, Senator Kennedy, as I think you were discussing with Mr. Henson and the first set of witnesses.

Wilks involved practices that the District Court had found were required by the consent decree. This statute would purport to estop individuals from challenging any action that implements the consent decree. No individual could possibly know every conceivable practice that an employer would use to implement a consent decree until it is actually implemented—that is, until it is adopted. Most consent decrees have very general language about goals and timetables and particular kinds of selection practices employers may or may not use; but they leave a lot of discretion to the employer in the future, and leave it to the plaintiff class to be able to come back in court and challenge whether or not the employment practice that the employer is using is properly implementing the decree.

All that Senator Hatch was suggesting, I think—and I think correctly so—is that an individual who is adversely affected by that discretionary practice that is used to implement this decree should have an equal opportunity to challenge its impact on him.

In addition let me address some constitutional concerns I have about section 6. Professor Tribe has done an admirable job of attempting to argue for the constitutionality of this bill, and he has done so by what he calls a process of interpretation. He says the courts will be able to fill in the blanks that are being left by this Congress.

But I would note that he says that under a guise of saying that *Martin* v. *Wilks* says if a special remedial scheme is designed by a legislative body that is consistent with due process, it may estop fine persons who are not parties to the lawsuits. Here, Congress is

making no effort to provide those procedures that are consistent with due process. According to Professor Tribe, they can just leave it to the courts. I would suggest that the due process clause as interpreted by the U.S. Supreme Court of the United States requires much more of Congress. It requires some deliberation.

No one is questioning that rule 23(B)(1) and rule 23(B)(2) of the Federal Rules of Civil Procedure are unconstitutional. As my written testimony suggests, and as I think any lawyer worth his salt would testify to this committee, those rules are constitutional, but they are narrowly drawn. And rule 23(B)(3), which is the class action rule that will apply in almost every one of these kinds of cases, specifically requires notice, and if one reads Professor Tribe's colleague, Arthur Miller's, treatise and Charles Wright's treatise on Federal practice, they say it is an essential requirement of due process that rule 23(B)(3) requires that notice be provided to people who are going to be made party to a class and bound by a judgment rendered therein.

So I would suggest that this bill does not create the notice procedures that are required by the Constitution if this bill is going to create a statutory estoppel rule, and for that reason it is constitutionally deficient.

In addition let me suggest that Professor Tribe cites the *Mullane* case and says that 40 years of law show that due process requirements are being satisfied by the statute. What Professor Tribe fails to do is pick up with cases starting with *Matthews* v. *Eldridge* in 1976 and moving forward, which suggest that in fact, contrary to Professor Tribe—and they are contrary to Professor Tribe if you read his treatise, because he criticizes them and says he strongly disagrees with them—that in fact in doing a due process analysis one does consider the importance of the individual interest at stake, just as Senator Hatch was suggesting in his questioning of Professor Tribe.

It is relevant what the individual interest is at stake. It is relevant what the governmental interest is. And it is relevant what the risk of error to depriving an individual of his right without his day in court will be. And it is facile, I would suggest, to equate a probate proceeding or a bankruptcy proceeding with a title VII action in which a consent decree is being entered.

In a probate proceeding, in a bankruptcy proceeding, what the State is authorizing is that we will have a legal proceeding which will terminate all existing claims against a legal entity so that we can terminate the legal entity. What an employer and a plaintiff class do in creating a settlement that is entered in the form of a consent decree is create a structure to govern an ongoing relationship, in many of these instances, an engine for discrimination. That may be a lawful engine for discrimination to overcome past discrimination. It may be a lawful engine of discrimination because of the U.S. Supreme Court's interpretation of Title VII in *Johnson* v. *Transportation Agency*. But as Justice Marshall's opinion in *McDonald* v. *Santa Fe* says, and as Justice Brennan's opinion in *Johnson* says, individuals who are affected by those engines of discrimination have rights, and the engines can go too far and trample them. And while that may create some problems to employers and to plaintiffs' classes who are creating these engines, they have

to defend them, and if they can defend them, they are entitled to operate the engines. But to deny an individual his right to challenge the adverse employment action taken against him under this engine, I would submit, is a gross violation of due process. The due process clause would require to be taken into account the fact that we're not talking about past claims; we are talking about future claims. We are not talking about terminated legal entities; we are talking about new entities that are being created to govern future relationships.

Let me finally say that there are existing procedures in place, and that one does not need this law to accomplish much of the finality concerns and additional concerns that the proponents of this bill are seeking to obtain.

Specifically, there are joinder procedures, Senator Adams; there are class action procedures. One can create defendant classes if one provides the requisite notice and attempts to bind people with a certified class representative. We don't need this bill to do that. The Federal Rules of Procedure already exist.

In addition, one can transfer cases. If one is filed in Salt Lake City, as Senator Hatch asked, a motion for transfer can be made, and it can be consolidated with a case in Boston.

The point is that this is not a new issue. As Mr. Barr has testified, these issues come up in all kinds of litigation, whether they be antitrust litigation or employment discrimination litigation or any area of law. There are many kinds of litigation that affect nonparticipants, and our Federal Rules have been designed to deal with them. And while there have been many times it has been considered that we should try to dispose of all claims at one time, we have been thoughtful enough to recognize, and the drafters of the Federal Rules and this Congress have been thoughtful enough to recognize, that what we need is a set of rules that are designed to accommodate both the individual's interest in expressing his concern in court and the defendant's concern for producing some finality. And I would suggest that the existing set of procedures are more than adequate to do so.

The CHAIRMAN. I will give you another minute, if you could, please, before going to Mr. Larson.

Mr. NAGER. Let me finally say that not only are the existing procedures adequate, that section 6 really is not that concerned with the finality that it purports to want to seek; it contains exceptions in it for individuals who in fact have been sued for. If the Federal Government initiates a suit, or if a plaintiff class initiates a suit, this bill would say that individuals whom the Federal Government has sought relief on behalf of, or that a plaintiff class has sought relief on behalf of, are not barred.

The irony here is this bill precludes people who no one has tried to protect. Rather, it only seeks to close out those who have had no opportunity to have the issue considered in court.

Finally, let me also say that I think the retroactivity provisions in this bill, the new statute of limitations provisions in this bill, and the attorneys' fees in this bill are totally inconsistent with the concerns that Mayor Arrington was expressing.

The retroactivity provision would upset every judgment and every order entered in every case between the day of the decisions

entered last term and the enactment of this bill. That is expressing quite a lot of disrespect for the finality of judgment.

In addition, the lengthy statute of limitations provisions that have been proposed in this bill would not require an individual to sue at the time they have reason to know their interests are going to be adversely affected. Rather, it would say they could wait until the practice had actually been applied to them.

I join with Mr. Barr in his written testimony in saying that the statute of limitations should run from the time a person knows or should know that he has a claim. This bill would overrule *Delaware State College* v. *Ricks*, and preclude that standard.

Finally, let me say, and I will close, Mr. Chairman, that Mr. Arrington was complaining about the enormous amount of attorneys' fees imposed upon the City of Birmingham by having to defend this litigation. If that is true, then he should join with me in opposing the amendments to the attorneys' fees provisions of this bill, which would preclude an employer and a plaintiff from getting together and agreeing to waive statutory attorneys' fees in order to settle a case—a settlement that is in the interest of the plaintiff class, is in the interest of the defendant, and is only not in the interest of the plaintiff lawyer's bar.

Thank you.

The CHAIRMAN. Thank you.

[The prepared statement of Mr. Nager and responses to questions from Senator Jeffords and Senator Hatch, follows:]

PREPARED STATEMENT OF GLEN D. NAGER

Mr. Chairman, and Members of the Committee, I am Glen D. Nager, a partner in the law firm of Jones, Day, Reavis & Pogue, where I practice primarily in the areas of labor and employment law and appellate litigation. As such, I have counselled numerous employers concerning, and litigated many cases involving, many of the issues addressed by S. 2104. In addition, from 1986-1988, I served as Assistant to the Solicitor General in the Department of Justice; one of my principal responsibilities in that position was to advise the Solicitor General concerning labor and employment issues before the Supreme Court of the United States, including the issues that are the subject of the current bill. Moreover, at Jones Day and at the Department of Justice, I have had the opportunity to file briefs in many of the cases that are the object of S. 2104; indeed, I presented oral argument for the United States in Marino v. Ortiz, a case that raised the same issue as that decided in Martin v. Wilks. Because of my past involvement in these issues, I welcome this Committee's invitation to present my views on S. 2104.

In analyzing this bill, I have applied the three major principles that guided the 1964 Congress in enacting Title

VII. In my view, these three principles are fundamental to any sound theory of employment discrimination law, and deserve equal respect today.

The first of these principles is that employment discrimination law should only attempt to protect individuals from arbitrary employment discrimination, and not attempt to ensure that all plaintiffs win their cases or that all groups in society are equally represented in all job classifications. Government can and should concern itself with protecting individuals from discrimination on the basis of race, religion, and gender; the individual is the heart of our democratic polity, and government should protect individuals from arbitrary and irrational discrimination by their employers. Government should not, however, generally concern itself with ensuring that plaintiffs win cases or that groups achieve particular results: Not all plaintiffs are victims of employment discrimination, and defendants should be presumed innocent until proven guilty. Likewise, members of the various racial and gender groups do not have the same level of qualifications for or interest in all jobs, and the goal of our employment laws should be equality of opportunity, not uniformity of result. That Congress embraced these principles when it enacted Title VII in 1964 is quite clear: the statute phrases its protections in terms of the individual; it prohibits holding an employer in violation of the Act merely

because an imbalance exists in its workforce; and it places the burden on plaintiffs to show that they have been discriminated against. See Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702, 707 (1978); Connecticut v. Teal., 457 U.S. 440, 446-48 (1982); Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-56 (1981).

The second basic principle informing my analysis of the bill is that our employment discrimination laws should intrude as little as possible on the authority of employers to make employment decisions. Employers are much better situated, and are more competent, than are courts or government bureaucrats to determine how employees should be selected, assigned, trained, and deployed; business efficiency and creativity, and thus employment opportunities for American workers, will be undermined if the responsibility for making employment decisions is assumed by government. Indeed, a large cross-section of American society believes that employers have a right -- founded in private property and liberty of contract -- to make employment decisions free from governmental interference; granting courts or government bureaucrats broad authority to prescribe employment qualifications that employers may or may not use in job selection would necessarily conflict with this national ideology. While the enactment of Title VII demonstrates that neither of these concerns -- business efficiency or business autonomy -- is absolute, its carefully

drawn provisions also stand as telling evidence that both concerns must be carefully accommodated in any sound system of employment discrimination law. See Furnco Construction Corp. v. Waters, 438 U.S. 567, 578 (1978) (courts lack competence to make business decisions); United Steelworkers v. Weber., 443 U.S. 193, 206 (1979) ("Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business").

The third and final foundational principle informing my analysis of S. 2104 is that voluntary compliance and prompt and inexpensive dispute resolution best serves those whom Title VII seeks to protect. Job applicants and employees do not want lawsuits; they want employment. Moreover, applicants and employees have families to support and lives to lead; they cannot wait years for resolution of their claims, and it is unhealthy to allow their claims to linger. Inexpensive and speedy dispute resolution is more likely to serve these peoples' needs than is protracted litigation. Thus, in Title VII, Congress provided for relatively short periods of time in which charges of employment discrimination may be filed; required employers and employees to conference and conciliate about such charges; and provided for only limited forms of equitable relief (in order to encourage settlement and, where appropriate, prompt restoration of the employment

relationship). See Alexander v. Gardner-Denver Company, 415 U.S. 36, 44 (1974); Carson v. American Brands, 450 U.S. 79, 88 n.14 (1981)

In my view, S. 2104 conflicts in many serious respects with these fundamental employment discrimination principles. It repeatedly confuses proper concern for victims of employment discrimination with improper concerns for plaintiffs and their lawyers. In various sections, it elevates concern for uniformity in group participation over concern for protection of individual opportunity. And it implicitly assumes in various sections that courts and government bureaucrats are better trusted with employment and litigation decisions than are employers and employees. The practical consequence of this misfocus will be increased, not decreased, discrimination; increased, not decreased, inefficiency and unemployment; and increased, not decreased, litigation. For these reasons, I suggest that S. 2104 is seriously flawed and pray, perhaps naively, that the members of this Committee and the rest of Congress will reconsider it. In all events, I commend the President and the Attorney General for their opposition to it.

SECTION BY SECTION ANALYSIS

Section 2

Section 2 of the bill sets forth two "findings," namely: (1) that "recent" Supreme Court decisions have "dramatically"

cut back on the "scope and effectiveness" of protection under civil rights laws; and (2) that existing law does not adequately deter employment discrimination or provide adequate remedies for victims of discrimination. These findings are, for the most part, empirically unsupportable.

First, it is worth noting at the outset that the bill does much more then address "recent" Supreme Court decisions. By my count, it seeks to reverse at least 13 decisions of the Supreme Court, some dating back to the mid-1970s. More importantly, it seeks to restructure our entire civil rights scheme. The legislation is thus neither restorative nor curative; it is new and radical.

Second, with the possible exception of the decision in Patterson v. McLean Credit Union, I take issue with the suggestion that the Supreme Court has "cut back" on the protections available under our civil rights laws. On the contrary, the Court has attempted to ensure that the civil rights of all Americans are equally protected, and that this protection is afforded in the least intrusive and least expensive manner possible. The contrary "finding" of S. 2104 rests on the mistaken premise that the effectiveness of civil rights laws should be measured solely by reference to how many plaintiffs win cases, or by reference to how uniform the representation of each racial, ethnic, and gender group is in each job classification of each employer. As I have explained

above, the effectiveness of the civil rights laws cannot and should not be measured in such a myopic, parochial, and authoritarian fashion.

Finally, the existing constellation of employment discrimination laws is, for the most part, more than adequate to protect employee rights. While there is no doubt that isolated problems can be found and that vigorous enforcement is necessary, the basic system is quite extensive and generally sound. If anything, the mechanisms for addressing employee concerns need to be simplified and streamlined, not made more complex and adversarial (as this bill would do). The contrary "finding" of S. 2104 rests on the mistaken premise that employee rights are adequately protected only by protracted federal court litigation and by intense supervision of business by courts and administrative agencies. Protracted litigation processes, however, work to the detriment of those needing and deserving prompt relief; and both common sense and increasing amounts of empirical evidence show that courts and administrative agencies are not competent to run American businesses.

Sections 3 and 4

In Wards Cove Packing Co. v. Atonio, 109 S.Ct. 2115 (1989), the Supreme Court clarified the appropriate application of disparate impact theory in Title VII cases. Sections 3 and 4

of S. 2104 aim to reverse the Supreme Court's decision in Wards Cove. Criticism of the Wards Cove decision rests, however, on a misunderstanding of the proper place of disparate impact analysis in our employment discrimination laws.

The Court first approved the use of disparate impact theory as a means of establishing employment discrimination in Griggs v. Duke Power Company, 401 U.S. 424 (1971). At issue in Griggs were written apptitude tests and a high school diploma requirement that the employer had adopted for the purpose of improving the general quality of its work force. The Court held that a violation of Title VII may be established without a finding of intentional discrimination where a facially neutral employment practice disproportionately excludes individuals in a protected class and that practice is not justified by "business necessity."

In its subsequent decisions, the Court consistently reaffirmed that a Title VII violation may be established without a finding of discriminatory purpose. It did so, however, only in cases involving objective, standardized employment criteria -- such as tests or height-and-weight requirements. See, e.g., Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975) (written tests); Dothard v. Rawlinson, 433 U.S. 321 (1977) (height-and-weight requirements). Moreover, it found a prima facie case of disparate impact to be established only where a specific employment practice was shown to have a

"significantly discriminatory impact." See Connecticut v. Teal, 457 U.S. 440, 446 (1982). Finally, it recognized that "business necessity" existed wherever the employer's "legitimate goals of safety and efficiency . . . are significantly served by -- even if they do not require -- [the challenged selection rule]." New York Transit Authority v. Beazer, 440 U.S. 568, 587 n.31 (1979). See also Washington v. Davis, 426 U.S. 229, 250-52 (1976).

Unfortunately, neither the lower federal courts nor the Equal Employment Opportunity Commission ("EEOC") understood disparate impact theory in this differentiated way, and they proceeded to apply the Griggs rule in an unlimited fashion and to very different fact situations. Thus, whereas the Court had applied disparate impact theory only to objective selection practices, the lower courts began applying it to such subjective selection devices as personal interviews, supervisor ratings, and assessments based on unstructured weighing of objective considerations (such as grades, prior experience, and references). Likewise, whereas the Court had applied disparate impact theory only where a selection practice had itself caused a significantly disproportionate exclusion of individuals in a protected group, the lower courts began to extend it to challenges to the cumulative effect of multiple employment practices. Finally, whereas the Court found business necessity to exist where a selection practice reasonably related to the

nature of the job and the overall business enterprise, the lower courts began to require that the selection practice be absolutely essential to the requirements of a specific job; indeed, following the EEOC's guidelines, many courts began to require formal "validation" -- i.e., scientific substantiation -- of selection devices associated with a disparate impact. The consequence of these developments in the lower courts was increased use of surreptitious quotas by employers and, in many cases, a lowering of job standards, increased inefficiency in service and production, and a growing inability to compete in the international marketplace.

It was against this background that the Supreme Court reached its decision in Watson v. Forth Worth Bank and Trust, 108 S. Ct. 2777 (1988). There, the Court held for the first time that the disparate impact analysis is applicable in cases involving subjective employment criteria. Watson, 108 S. Ct. at 2786-87. Four Justices, however, recognized that, in so extending the reach of the disparate impact analysis, the Court was greatly adding to the pressures that employers already felt to adopt surreptitious quotas, to adopt inefficient selection practices, and to lower job standards. This plurality therefore determined that the appropriate burdens of proof applicable in disparate impact cases should be revisited. Pre-telling the result in Wards Cove, they suggested that, to prevail in a disparate impact case, plaintiffs should have to:

(1) identify the specific employment practice that is in issue;

(2) establish that the disparity "caused" by that practice is itself sufficiently substantial to establish a prima facie case of discrimination; and

(3) prove by a preponderance of the evidence either that the challenged practice does not "significantly serve" a legitimate business goal of the employer or that acceptable alternatives would have served the same business goal without resulting in the same disparate impact.

In Wards Cove, a majority of the Court adopted the suggestions of the Watson plurality. Specifically, the Court held (a) that, to establish a prima facie case of disparate impact in the selection of workers for particular positions, plaintiffs must do more than simply show the existence of an imbalance in one segment of the workforce; rather, plaintiffs must identify a particular employment practice and show that that practice has disproportionately excluded persons in a protected class who are otherwise qualified for and available to fill the relevant jobs; (b) that, even where such a prima facie case is established, the employer need not show that the challenged practice is "essential" or "indispensable" to its business; rather, the employer must simply produce evidence that the practice "significantly serves" a legitimate business goal; and (c) that the plaintiff bears the ultimate burden of persuading the trier-of-fact that the challenged practice does not significantly serve a legitimate business goal or, alternatively, that a different practice with a lesser adverse

impact would accomplish the same goal at approximately the same cost and burden to the employer.

In my view, the Court's decision in Wards Cove is fundamentally sound. It recognizes that myriad lawful and unlawful factors can give rise to workforce imbalances; thus, to separate the lawful from the unlawful, the decision properly requires a plaintiff, in order to establish a prima facie case, to show that a particular practice has itself substantially contributed to the imbalance. The decision also recognizes that few, if any, selection practices can be shown to be "essential" to an employer's business; thus, to prevent an employer from having no option but to superimpose quotas on its selection practices, the decision properly concludes that the challenged practice need only reasonably serve the employer's legitimate business goals. Finally, the decision recognizes that courts and administrative agencies are not competent to restructure employee selection processes; thus, to prevent intrusive second-guessing of business-decisionmaking, the decision properly places the ultimate burden of persuasion on the plaintiff.

By contrast, S. 2104 is fundamentally unsound; it is entirely insensitive to the realities of the modern workplace, the proper concerns of our employment discrimination laws, and the proper roles of courts and administrative agencies in this area. In effect, it would made the burden of establishing

discriminatory effect weightless, and the burden of establishing business necessity so onerous that it can never be satisfied.

First, by providing that a prima facie case is established wherever a plaintiff demonstrates that a "group of employment practices" -- defined in Section 3 to mean a "combination of employment practices or an overall employment process" -- has resulted in a disparate impact, Section 4 of the bill effectively creates a presumption that workforce imbalances are a result of employment discrimination. There is no basis in fact or law for this cynical presumption. People do not, by choice or by chance, distribute themselves with mathematical precision, and there are a myriad of innocent causes -- e.g., applicant dropout, employee self-selection, facially neutral selection practices without adverse impact, and/or chance -- that may lead to statistical imbalances in the composition of an employer's workforce. Absent proof that the employer has intentionally discriminated against applicants or employees, or that it has used a particular practice that has substantial causal connection with the work force imbalance, there is no sound reason to find a prima facie violation of Title VII; the law should not prohibit employers from engaging in a combination of lawful acts, each of which, individually, may

have "contributed" to the bottom-line racial and sexual composition of the workforce.1/

Second, by providing that a violation of Title VII is established where a defendant fails to prove that an "employment practice" or "group of employment practices" is "essential to effective job performance," Section 4 of S. 2104 ensures that employers with work force imbalances will have no choice but to superimpose quotas on their selection processes. The law should not force employers to do so.

That employers will have no choice but to use race and gender-based quotas should be obvious. Employers do not operate in scientific laboratories; they operate under real

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1/ I suspect that S. 2104 reaches a contrary conclusion out of a misplaced concern that plaintiffs cannot isolate the particular practice or practices, if any, that actually cause a workforce imbalance. In fact, plaintiffs can employ multiple regression analyses to identify and isolate the effects attributable to the various employment practices used by an employer. See Campbell, Regression Analysis in Title VII Cases: Minimum Standards, Comparable Worth, and Other Issues Where Law and Statistics Meet, 36 Stan. L. Rev. 1299 (1984). Moreover, information concerning the effects of the employer's practices is, through the liberal rules of discovery and access to the EEOC's investigatory files, as readily available to plaintiffs as it is to the defendant. See Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981). Finally, while there may be instances in which multiple regression analyses do not provide a clear answer, or in which sufficient information is not available, plaintiffs properly bear the burden of proving that a prima facie violation of the law has occurred and, a fortiori, the risk of loss associated with uncertainty or unavailability of proof about causation should be on them. See Connecticut v. Teal, 457 U.S. at 446.

world pressures of time and cost, and they must choose employees and selection criteria on the basis of predictions, with less than perfect information, and under competitive pressures (in terms of both supply and demand). Furthermore, while there is considerable agreement that qualities such as alertness, common sense, compatability with others, drive, ethical sensitivity, judgment, and originality are needed for effective job performance, there is very little agreement about how to detect or measure these qualities. Moreover, there is simply no consensus about what constitutes effective job performance for business managers, doctors, industrial engineers, judges, scientists, or, indeed, any person who performs a job that involves complex tasks or requires the exercise of judgment. Finally, the reality is that actual work responsibilities tend constantly to alter over time, as the conditions of each job, the market, technology, governmental policies, and intellectual and social fashions change; as a consequence, it is rarely possible to define conclusively the content of any particular job. For all of these reasons, employers will rarely, if ever, be able to show that particular selection practices are "essential to effective job performance," and they will thus have to use quota systems of employment to ensure that their selection practices do not subject them to massive backpay liabilities.

Although it should be equally obvious, quota systems of employment are not an acceptable alternative to qualitative selection methods -- e.g., tests, educational and experience requirements, and social and personal characteristics. Race and gender-based quotas degrade the very persons they are supposed to assist. Moreover, they create resentment on the part of, and are fundamentally unfair to, those who are denied employment opportunities as a result -- a group that includes, in addition to white males, females and minorities who do not get the benefit of the quotas put in place, or who are denied opportunities because of the ceilings imposed by the quotas. Finally, in contrast to qualitative selection methods, race and gender-based quotas do not even purport to aim at fostering and rewarding high standards of excellence, and thus lessen our nation's ability to produce efficiently and to compete in the ever increasing international marketplace.

Of course, aiming for excellence is not the same thing as achieving it (and sometimes qualitative standards are, unfortunately, not even used for this purpose). But aiming at excellence certainly increases the odds of achieving it, with or without scientific validation of the selection methods. As the noted lawyer/industrial psychologist, Barbara Lerner, has noted, "[i]n the aggregate, heightened probabilities for excellence are not a function of the validity of any particular selection device," but "are the result of a total situation in

which vast numbers of employers are free to experiment with an unlimited number of possible qualitative requirements, discarding those that seem unsatisfactory and replacing them with others that seem more promising, and so on and on, in a continuing, open-ended process." Lerner, Washington v. Davis: Quantity, Quality and Equality in Employment Testing, 1976 Sup. Ct. Rev. 263, 304-305. Race and gender-based quotas are at odds with this end.

S. 2104's turn away from the search for excellence -- and toward quotas -- will ironically, but tragically, work against the very persons that S. 2104 purports to aim to help. Employers who replace merit systems with quota systems are, in many circumstances, forced to restructure jobs to correspond with the quota systems they are using. Employers typically do so by breaking complex jobs down into their component parts in order to create a multiplicity of simple, repetitive tasks. Once this is done (as it was in a large number of jobs in the first half of this century, and again in the last two decades), individual competence becomes irrelevant and workers are treated as interchangeable parts. But workers in such systems are not satisfied, productive members of society; rather, they are bored, demoralized men and women who can no longer define themselves by reference to their work or vocational competence. Moreover, having been relegated to the level of a machine, they become replaceable -- frequently, in our modern

economy, by either machines or foreign workers -- and difficult to retrain and reemploy. Indeed, a growing body of empirical evidence suggests that, as our employment discrimination and other laws have required employers artificially to restructure jobs and selection practices, we as a country have become less efficient, less productive, and less able to compete with our foreign competitors. Thus, the end result of the quota process mandated by S. 2104 will, quite likely, be increased domestic inefficiency and unemployment (especially of workers in marginal jobs, who are frequently minorities and disadvantaged women). Such results are plainly inconsistent with Title VII's goal of increasing employment opportunities for American workers -- minority, female, and otherwise.

The supporters of S. 2104 no doubt turn toward quotas out of their frustration with the high-levels of unemployment and poverty that continue to plague individuals of many minority and, to a lesser extent, female groups. But the supporters of S. 2104 will not find the solution to these problems if they continue looking in the wrong place. While there is still much discrimination to be rooted out of the workplace, it is not discrimination -- at least not employment discrimination -- to select among applicants and employees on the basis of reasonable (even if not essential) job standards and qualifications. Rather, it is at most the perpetuation of society's failure to provide racial minorities and women with

the literacy, numeracy, and interpersonal skills that are necessary for successful employment in our modern economy. The supporters of S. 2104 would better serve these people by focusing on these underlying social problems, rather than attempting to lay blame on American employers and the Supreme Court for society's failings (as does S. 2104).2/

Section 5

Section 5 of S. 2104 attempts to reverse the Supreme Court's decision in Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989). In that case, the Court ruled that, where both legitimate and illegitimate factors play a role in a particular employment decision, the employer is not liable under Title VII if it proves that it would have made the same decision even if the illegitimate factors had not been taken into account.

2/ Lest it be overlooked, I also note that Section 4 of S. 2104 goes well beyond overruling the decision in Wards Cove. It purports to limit the business necessity inquiry to selection methods relating to job performance; but courts have long recognized that selection criteria may legitimately relate to health and safety concerns as well. See New York Transit Authority v. Beazer, 440 U.S. at 587 n.31; Washington v. Davis, 426 U.S. at 250-52. It also purports to limit the business necessity defense to disparate impact cases. While I find some merit in this proposal, it would constitute a substantial change in existing law (that exists apart from the Wards Cove decision). See, e.g., UAW v. Johnson Controls, Inc., 886 F.2d 871 (7th Cir. 1989)(en banc.); Miller v. Texas State Board of Bar Examiners, 615 F.2d 650 (5th Cir. 1980).

Section 5 modifies the Court's decision by providing that an unlawful employment practice exists wherever race, sex, or religion is a "motivating factor" in the employment decision, even if the employer proves that it would have reached the same decision in any event. Rather, an employer can use such proof only to limit the employee's entitlement to back pay or reinstatement. The employer would still be liable for attorneys fees and other damages provided for in Title VII and the proposed legislation, such as compensatory and punitive damages.

The "motivating factor" standard in Section 5 provides little guidance to employers or courts. Decisionmaking in most employment settings is a multi-person, multi-factor process. While it is unfortunate, it is not uncommon for one or more persons in these processes to say things that they should not say, and to think things that they should not think. Under Price Waterhouse, those illicit statements and thoughts will produce liability only if they were necessary to the ultimate decision. By imposing liability wherever these statements and thoughts exist, however, Section 5 comes dangerously close to policing speech and thought rather than action. It will require employers closely to monitor the statements and thoughts of all employees involved in the selection process, adding yet another layer of administrative cost to the selection process, and limiting even further the freedom of employees casually to express themselves.

Equally important, Section 5 will make it next to impossible to settle "mixed-motive" cases, even if those cases are the ones that employers would otherwise settle quite promptly. Where evidence of mixed-motives exist, employers usually recognize that they are much less likely to win at trial. But Section 5 adds attorneys fees, compensatory damages, and punitive damages to the price of settlement, and thus makes settlement much less likely to happen. Section 5 is just one of many instances in which S. 2104 sacrifices the real needs of persons protected by Title VII in favor of the economic and political agendas of their lawyers.

Section 6

In Martin v. Wilks, 109 S.Ct. 2180 (1989), the Supreme Court held that certain white firefighters were not estopped from challenging certain race-conscious promotion decisions that were allegedly required by the terms of consent decrees to which the firefighters were not party. Section 6 of S. 2104 purportedly attempts to overrule Martin v. Wilks by creating a scheme that, it contends, will "facilitat[e] prompt and orderly resolution of challenges to employment practices implementing litigated or consent judgments or orders." Of course, since Section 6 addresses any employment practice that "implements" a litigated or consent judgment, it goes well beyond the employment practices at issue in Wilks, which were "required"

by the consent judgment entered there. In any event, I have serious doubts about the constitutionality of Section 6. Moreover, I am quite certain that better devices exist for "facilitating prompt and orderly resolution of challenges to employment practices implementing litigated or consent judgments or orders" and that, given the many irrational exceptions contained in Section 6, there is serious reason to question whether this provision is in fact designed to accomplish that objective. On the contrary, it appears to have the rather invidious and mean-spirited aim of creating procedural obstacles to the assertion by white males of the substantive rights created in Title VII.

I begin with my constitutional concerns. It is a fundamental principle of Anglo-American jurisprudence that it "is a violation of due process for a judgment to be [held] binding on a litigant who was not a party or a privy" to the litigation in which that judgment was entered. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.7 (1979). See also Blonder-Tongue Laboratories, Inc. v. University Foundation, 402 U.S. 313, 328-329 (1971); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 110 (1969); Hansberry v. Lee, 311 U.S. 32, 40-42 (1940). "This rule can be traced to an opinion of Chief Justice Marshall in Davis v. Wood, 1 Wheat. 6, 8-9 (1816)," and "is part of our 'deep-rooted historic tradition that everyone should have his own day in court.'" (Ashley v.

City of Jackson, 464 U.S. 900, 902 (1983) (Rehnquist, J., joined by Brennan, J., dissenting from denial of certiorari), quoting 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure, § 4449, at 417 (1st ed. 1981)). This "deep-rooted historic tradition," which (as Martin v. Wilks noted) is embodied in both the Due Process Clause and the Federal Rules of Civil Procedure, recognizes that just and accurate decisionmaking is more likely to result when persons are allowed to present their own cases -- at the time and place of their own choosing. See Parklane Hosiery Co. v. Shore, 439 U.S. at 327 n.7; Blonder-Tongue Laboratories, Inc. v. University Foundation, 402 U.S. at 328-329.

Of course, as the Court in Martin v. Wilks recognized, there are a few limited exceptions to the rule that a judgment or decree among parties to a lawsuit resolves issues among them but not among strangers to those proceedings. Strangers may be bound by litigation to which they are not party where there are sufficient assurances that their interests are adequately represented therein by a certified class. See Hansberry v. Lee, 311 U.S. at 41-42; Fed. R. Civ. P. 23. Likewise, where a person has sufficient control over the conduct of one of the parties to the litigation, he may be treated as if he were a party. See Montana v. United States, 440 U.S. 147, 154-155 (1979). Finally, where there is a special remedial scheme that expressly forecloses successive litigation by non-participants

-- as, for example, exists in bankruptcy and probate statutes -- legal proceedings may terminate pre-existing rights. See NLRB v. Bildisco & Bildisco, 465 U.S. 513, 529-530 (1984); Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 490-491 (1988). But, as the Court noted in Martin v. Wilks, these exceptions lie only to the extent that "the scheme is otherwise consistent with due process." 109 S. Ct. at 2184 n. 2.

A scheme is otherwise consistent with due process only when it provides "notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford[s] them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). The purpose of this notice requirement is to enable the recipient to "choose for himself whether to appear or default, acquiesce or contest" (Mullane, 339 U.S. at 314); to that end, "[n]otice by mail or other means as certain to ensure actual notice [is required in] a proceeding which will adversely affect the liberty or property interests of any party, . . . if its name and address are reasonably ascertainable." Mennonite Board of Missions v. Adams, 462 U.S. 791, 800 (1983). Moreover, the notice must be such that it will "apprise [the person] of, and permit adequate preparation for, an impending 'hearing.'" Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 14 (1978). Finally, due process

requires "'an opportunity . . . granted at a meaningful time and in a meaningful manner for [a] hearing appropriate to the nature of the case.'" Boddie v. Connecticut, 401 U.S. 371, 377-378 (1971) (citation omitted).

Under these due process principles, there is serious reason to doubt the constitutionality of the procedures set forth in Section 6 of S. 2104. Section 6 does not itself create a procedure that reasonably attempts to provide interested persons with notice of the proceedings to which it attempts to bind them. Nor does it ensure an opportunity for adequate preparation for the hearing. And, finally, it does not provide for a hearing that is appropriate to the nature of the case, that occurs at a meaningful time, and that is undertaken in a meaningful manner.

With respect to the notice issue, Section 6 does not even purport to create any kind of notification procedure. Rather, it purports to bind persons who have actual notice from another source, who have been adequately represented by another person, or who were the object of reasonable notice efforts. The Supreme Court has made clear, however, that actual notice of a proceeding does not relieve the government of its affirmative duty to give an individual formal notice of a proceeding in which his rights will be finally adjudicated. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. at 311; see generally Comment, Collateral Attacks on Employment

Discrimination Consent Decrees, 53 U. Chi. L. Rev. 147, 162 (1986). Likewise, the Court has made clear that adequacy of representation does not relieve the government of its obligation to provide an individual with notice and an opportunity to represent himself (as occurs in the class action context under Rule 23 of the Federal Rules of Civil Procedure). See Hansberry v. Lee, 311 U.S. at 41-42; 7B C. Wright, A. Miller, & M. Kane, supra, § 1786, at 188-191 (2d ed. 1986). Finally, the reasonable efforts of others to provide notice of the proceedings cannot substitute for procedures that ensure that these efforts occur in every circumstance. See Comment, supra at 162.

With respect to the adequacy of any notice provided, Section 6 simply contains no requirements and sets no standards. Section 6 does not require that the individual who will be bound be informed of the nature of the proceeding or the issues that will be adjudicated in it. Section 6 does not require that the individual be informed of the relief sought in that proceeding or how that relief will affect his interests. And Section 6 does not inform the individual of the consequences of failing to appear, or of the rights that the individual will obtain by appearing. It simply states that the individual should be told that the proceeding "might" affect his interests. Such notice, occurring before the employment practice has even come into existence (much less applied to the

individual), is too general and speculative to be constitutionally meaningful. See Mennonite Board of Missions v. Adams, 462 U.S. at 800 (mortgagee's knowledge of tax delinquency is not equivalent to notice of pending tax sale); see generally Kramer, Consent Decrees and the Rights of Third Parties, 87 Mich. L. Rev. 321, 344 (1988).

Finally, Section 6 does not provide for a hearing that is appropriate to the nature of the case, that occurs at a meaningful time, and the takes place in a meaningful manner. To be sure, for persons who have actual notice of the proceeding, Section 6 states that those persons must have a "reasonable opportunity to present objections to such judgment or order." But the opportunity to present objections in these circumstances is not constitutionally sufficient; it does not include the rights of discovery, confrontation, cross-examination, presentation of testimony, argument, and appeal that are the hallmark of due process and that are necessary to ensure that the individual's right to be free from unlawful discrimination is adequately protected. See Goldberg v. Kelly, 397 U.S. 254, 266-271 (1970); Greene v. McElroy, 360 U.S. 474, 496-497 (1959); see also Laycock, Consent Decrees Without Consent, 1987 U. Chi. Legal F. 103, 111, 128. In similar circumstances, the Supreme Court has indicated that even parties to the litigation cannot be bound by a decree to which they have not consented (unless, of course, they have had

the opportunity to litigate their claims). See Firefighters v. Cleveland, 478 U.S. 501, 528-529 (1986).

I recognize that Section 6 does not purport to alter the standards for intervention under Rule 24 of the Federal Rules of Civil Procedure and, furthermore, that persons who have in fact intervened, either before or after the litigated or consent judgment was entered, retain the right to press their claims. The availability of intervention, however, does not relieve the government of its obligation to provide the non-party with notice of the proceeding. See Mullane, supra, at 172. Moreover, intervention may not be available prior to the entry of the decree or, indeed, until months or years after the entry of a decree -- as, for example, is true of a person who is denied a promotion or a job under a consent decree that was entered when he was a child. See Laycock, supra, at 149. Indeed, intervention may be denied -- either correctly or incorrectly -- and thus may not provide a vehicle for participation at all. See generally Cooper, The Collateral Attack Doctrine and the Rules of Intervention: A Judicial Pincers Movement, 1987 U. Chi. Legal F. 155, 161-164. And, in all events, the Supreme Court long ago held that the mere availability of a right of intervention is not a sufficient basis for binding an individual to a judgment entered in litigation to which the individual was not party. See Chase National Bank v. Norwalk, 291 U.S. 431, 441 (1934).

That some special remedial schemes -- like those employed in bankruptcy and probate laws -- may constitutionally bind persons who have failed to intervene does not support the constitutionality of Section 6. In the case of those remedial schemes, the private interest at stake, the likelihood of governmental error, and the magnitude of the governmental interest are fundamentally different. See Matthews v. Eldridge, 424 U.S. 319, 334-335 (1976) (in determining the type of hearing required, the importance of the private interest, the likelihood of governmental error, and the magnitude of the governmental interests must be considered); Logan v. Zimmerman Brush Co., 455 U.S. 422, 433-438 (1982) (same). In those schemes, the claims being asserted already exist, and the government is requiring that they be filed in order to ensure the termination of a legal entity; provided that it satisfies the constitional requirements of notice and opportunity for hearing, the government may legitimately seek to terminate claims that have not been filed against such expiring entities. See Martin v. Wilks, 109 S.Ct. at 2184 n.2. By contrast, litigation in the employment context seeks to structure an ongoing and continuing relationship; in doing so, it implicates future (as well as past) claims, creates a much greater risk of erroneously depriving individuals of future substantive rights, and presents a much less compelling case for finality and conclusiveness. Indeed, in such

circumstances, there are much more sensitive devices available for accommodating the individual's statutory right to challenge unlawful employment practices and the government's interest in promoting the prompt and orderly resolution of challenges to employment practices implementing litigated or consent judgments.

Specifically, in appropriate circumstances and pursuant to proper procedures, a person may be joined in and thus become bound by litigation in which he would prefer not to participate. See Fed. R. Civ. P. 19; Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 107-125 (1968). Moreover, in appropriate circumstances, that joinder may be accomplished by defendant class-certification procedures. See Henson v. East Lincoln Township, 814 F.2d 410, 420 (7th Cir. 1987) (Campbell, J., concurring in part and dissenting in part), cert. granted, No. 87-5461 (Nov. 2, 1987); Note, Defendant Class Actions, 91 Harv. L. Rev. 630, 639-647 (1978). Furthermore, even where joinder is not appropriate (because, for example, the claims of individuals are too speculative), a district court may transfer a later filed civil action to the district or division where the consent decree was originally entered, and consolidate the later action with the earlier one. See 28 U.S.C. 1404(a); Fed. R. Civ. P. 42; see generally 15 C. Wright, A. Miller & E. Cooper, supra, § 3848, at 249-251. Finally, statutes-of-limitations and the doctrine of

laches may be applied to ensure that any later actions are filed in a timely fashion; indeed, in appropriate cases, a defendant may legitimately claim that backpay is an inequitable remedy (since the action was taken pursuant to the terms of a court order). See Ashley v. City of Jackson, 464 U.S. at 902.

From both a constitutional and a policy perspective, these procedures are the much fairer means of producing a prompt and orderly resolution of challenges to employment practices implementing litigated or consent judgments. It is unreasonable to require an individual to challenge an employment practice prior to the entry of the decree mandating or permitting the practice; indeed, it arguably is unfair to require the individual to do so before the decree is actually applied to the individual. The parties to the lawsuit are much more familiar with the scope of the litigation, the relief being sought (and obtained), and at whose expense the relief is being granted. It makes sense, therefore, to place on them the burden of bringing in -- either through joinder or transfer and consolidation -- the additional persons who should properly be party to the initial litigation; conversely, it makes little sense, and is in fact unfair, to require those persons to participate at a time when their claims are so premature and speculative. Section 7 of S. 2104 admits as much: It establishes that the statute-of-limitations on a claim of discrimination does not even begin to run until the later of

the date of occurrence and the date of application; yet, Section 6 would have the statute-of-limitations period conclude before it has even begun to run. This is unfair.

Joinder, consolidation, and the sundry other procedures discussed above are also the much more efficient and sensible way of facilitating a prompt and orderly resolution of challenges to employment practices implementing a consent decree. Like Section 6, joinder and defendant-class action procedures allow the breadth of the initial lawsuit and the concomitant relief to be at least partially shaped in advance. Section 6, however, does not eliminate the need for, or difficulty of, identifying persons who, because of their interests, should be included in a lawsuit; it merely shifts that responsibility to less able shoulders. In addition, Section 6 will lead to inevitable litigation over the adequacy of knowledge and representation in the initial proceeding. Finally, statutes-of-limitations, laches doctrines, and limitations on equitable relief should ensure that any successive actions are filed in a timely fashion; and consolidation and transfer procedures ensure that claims raised in those actions can be dealt with in an orderly manner. Again, a statutory preclusion rule is not necessary to accomplish these results.

The joinder, consolidation, and other procedures discussed here are also at least equally well-suited to avoiding the

danger of inconsistent or contradictory proceedings. The prevention of such inconsistent or contradictory proceedings is one of the principal purposes of Rule 19 of the Federal Rules of Civil Procedure. Moreover, transfer and consolidation procedures are well-suited to prevent judicial proceedings from multiplying uncontrollably or undesirably, and to enable a single judge to control litigation that is initiated by different parties in different places. Indeed, even where joinder, transfer, and consolidation devices will not together ensure that only a single binding judgment can result concerning any particular matter, principles of stare decisis and comity will inform the second court that acquires jurisdiction over the matter, and thus minimize the possibility of inconsistent or contradictory judgments. In all events, a person subject to inconsistent or contradictory judgments may seek equitable mitigation of damages in the second action, reversal of the second judgment on appeal and, if unsuccessful in having the second judgment overturned, have an appropriate ground upon which to seek relief from the court entering the first judgment. See Fed. R. Civ. P. 60. These procedures have long been sufficient to prevent inconsistent or contradictory judgments, and there is no basis for asserting that a special procedure is needed or allowable in this context.

Finally, the joinder, consolidation, and other procedures discussed above are much better suited than is Section 6 to

promoting voluntary compliance with Title VII. In contrast to Section 6, these procedures do not require that all potentially interested persons be involved in the initial settlement discussions; on the contrary, they require the involvement of only the parties most directly and immediately affected, and it seems rather obvious -- and both game theory and my experience in private practice confirm -- that settlement is more likely to occur where fewer, rather than more, parties are involved. Moreover, allowing persons with much less immediate interests to await the operation of the consent decree before instituting suit discourages premature litigation and, concomitantly, promotes settlement and voluntary compliance. Finally, while allowing successive litigation of this type may discourage settlements that would give rise to liability to third-parties, such settlements do not deserve special protection by Congress; those settlements, by definition, involve unlawful race-conscious action, and procedures that discourage such acts should be praised (rather than damned); Section 6, by contrast, invites settlements that abrogate the rights of third-parties and, accordingly, deserves criticism as a means of shielding, and possibly promoting, unlawful employment discrimination.

Indeed, the various exceptions set forth in Section 6 suggest that the provision was intended to have precisely this effect. Section 6 does not preclude relitigation of issues addressed in a consent decree by members of a class represented

or sought to be represented in the action where the consent decree was entered -- principally, if not exclusively, members of minority and female groups. Nor does it preclude relitigation of issues addressed in a consent decree by members of a group on whose behalf relief was sought by the Federal government -- principally, if not exclusively, members of minority and female groups. Rather, it bars relitigation of issues addressed in a consent decree only by persons that no one sought to represent or protect -- principally, if not exclusively, white males. These different preclusion rules make no apparent sense. If anyone can properly be precluded, it is those persons for whom relief has already been sought in the litigation. That Section 6 does not preclude these persons suggests that Section 6 is designed merely to promote, or at least shield, unlawful discrimination against white males.

Of course, Justice Marshall's opinion for a unanimous Court in McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976), and, to a lesser extent, Justice Brennan's opinion for the Court in Johnson v. Transportation Agency, 107 S. Ct. 1442 (1987), make clear that white males are also protected by Title VII and that the disparate procedural rules set forth in Section 6 are inconsistent with the very purposes of Title VII. Moreover, if Section 6 in fact intends to hamper white males' ability to assert their statutory rights, it may well be unconstitutional under the Equal Protection Component of the

Due Process Clause. In any event, whether Section 6 intends to discriminate against white males or not, its irrational preclusion of successive litigation by bystanders but not beneficiaries of the initial litigation totally undermines the importance of the governmental interests being asserted and, accordingly, renders it suspect on a due process level as well. See Logan v. Zimmerman Brush Co., 455 U.S. at 442, 444.

Section 7

Section 7 of S. 2104 provides for a radical restructuring of the statutes-of-limitations applicable in Title VII cases. In doing so, it overrules at least three Supreme Court decisions, and abandons the rapid dispute resolution principles that have always served Title VII so well.

Section 7 reverses the decision in Lorance v. AT&T Technologies, 109 S. Ct. 2261 (1989). In that case, the Court held that the time period for filing EEOC charges challenging a facially neutral, but intentionally discriminatory, seniority system begins to run from the date that an individual knows or has reason to know that such a seniority system has been adopted, not from the date when the seniority system is applied to him. The Court's decision was a reasonable interpretation of prior case law. On the other hand, I am quite sympathetic with the view that, where an employment practice may not be challenged under the disparate impact theory, the

statute-of-limitations applicable to disparate treatment challenges should begin to run from the date an individual knows or has reason to know that the practice will actually be applied to him. In such circumstances, an exception to ordinary statute-of-limitations principles is warranted as a way to ensure that individuals do not institute premature lawsuits and that individuals are able to challenge employment systems at the time they have reason to know adverse applications to them will in fact occur. For these reasons, I support in principle the effort of S. 2104 to overrule Lorance.

Section 7, however, goes much farther than rejecting the rule of Lorance. It also proposes to extend the limitations period for filing charges with the EEOC from 180 days to two years. The 180-day period in the existing scheme was borrowed from the National Labor Relations Act and, as there, was intended to "encourage the prompt processing of all charges of employment discrimination." Mohasco Corp. v. Silver, 447 U.S. 825 (1979). In my experience, it has successfully done so: by requiring charges to be promptly filed, it promotes the rapid resolution of grievances, encourages the reestablishment of employment relationships, and protects employers against stale claims. There is no sound legal or empirical basis for extending the current time periods and allowing employment disputes to fester.

Section 7 adds insult to this injury by providing that the statute-of-limitations under Title VII does not begin until after an alleged unlawful practice has occurred or was applied adversely to affect the employee, whichever is later. This rule conflicts with the Supreme Court's earlier decisions in Delaware State College v. Ricks, 449 U.S. 250 (1980), and United Air Lines v. Evans, 431 U.S. 553 (1977). In those cases, the Court held that practices that have the effect of perpetuating past discrimination, but are not themselves based on discrimination, are not actionable under Title VII. Section 7, however, would allow an employee to wait (possibly for years given the proposed extension of the filing period) before bringing a claim -- even if the employee was aware of the alleged discrimination at the time of the initial occurrence. The decisions in Ricks and Evans represent the proper balance between the competing interests of vindication of employee rights and preventing employers from having to defend against stale claims.

Finally, Section 7 inappropriately eliminates the extended period for filing claims in deferral states. The deferral provisions were included in Title VII "to give state agencies an opportunity to redress the evil at which the federal legislation was aimed, and to avoid federal intervention unless its need was demonstrated." Mohasco Corp. v. Silver, 447 U.S. at 821. There is no apparent reason for depriving states of

the initial opportunity to address discrimination in their respective borders. In fact, in light of today's overburdened federal administrative and court systems, it makes sense to allow state agencies to resolve employment disputes wherever possible.

Section 8

Section 8 provides additional damages for victims of intentional discrimination (and, possibly, for victims of disparate impact claims under § 7(a)(2)). Specifically, it provides for the awarding of compensatory damages, and, in certain limited circumstances, punitive damages. It also specifies that the parties may demand a trial by jury when a plaintiff seeks compensatory or punitive damages. These proposed changes raise a number of troubling questions.

First, the provision for punitive damages raises constitutional questions. Though nominally civil, punitive damages are functionally penal; there is, therefore, a need for constitutional protections when punitive damages are available. In that regard, due process requires that juries be given guidance in their decisionmaking. Although Section 8 creates a standard for the award of punitive damages (i.e., that the employer engaged in an unlawful employment practice with "malice" or with "reckless or callous indifference" to protected rights), it provides no guidance with respect to the

amount of punitive damages that a jury may award. "Without statutory (or at least common-law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important, and potentially devastating, decision." Browning-Ferris Industries v. Kelco Disposal, Inc., 109 S. Ct. 2909, 2923 (1989) (O'Connor, Stevens, JJ., concurring and dissenting in part). For this reason, Section 8 may be unconstitutional under the Due Process Clause.

Second, the availability of jury trials will undermine Title VII's concern for relatively prompt resolution of employment discrimination claims. Jury trials, as the 1964 Congress recognized, result in delayed adjudication. The problem of delayed adjudication, inherent in both Sections 7 and 8 of S. 2104, is even more critical today than it was in 1964. In fact, the Federal Courts Study Committee recently noted, in its tentative recommendations, that the number of employment discrimination cases filed in federal court has increased by 2,166% since 1969. Indeed, the Committee suggested that many of these cases do not properly belong in federal court. Section 8 ignores the real world problems that alleged victims of employment discrimination face today and ensures that their claims, meritorious or not, will be unresolved for years to come; it also greatly, and

unnecessarily, increases the cost of defending Title VII actions.

Section 9

Section 9 of S. 2104 purports to "clarify" the attorneys' fees provisions of Title VII. Like Sections 7 and 8, however, Section 9 goes far beyond reversing the Supreme Court's 1988-89 decisions. Moreover, instead of promoting settlement and prompt adjudication of claims, the provision will encourage complicated and protracted litigation.

Section 9 allows for the recovery of additional expert witness fees in Title VII cases, thus reversing Crawford Fitting Co. v. J.T. Gibbons, Inc., 107 S. Ct. 2494 (1987), as it applied to Title VII. The increased availability of these fees, however, will merely encourage the use of expert witnesses and thus further complicate the conduct of Title VII litigation. Moreover, by increasing the amounts of money in issue, it will make settlement more difficult. Finally, it will further promote the second-guessing of business decisions. As I have emphasized, however, Title VII is better served by keeping litigation simplied and informal; and we should not encourage either courts or agencies to substitute an expert's opinion for the otherwise reasonable judgment of a business manager.

Section 9 also deletes the "as part of the" language in Section 706(k) of Title VII, which previously treated attorneys' fees as an aspect of "costs." In so doing, the legislation reverses the Court's decision in Marek v. Chesney, 473 U.S. 1 (1984), where the Court held that a plaintiff who recovers something less than the amount offered by a defendant in an offer of judgment under Rule 68 of the Federal Rules of Civil Procedure may not recover attorneys' fees for the period following rejection of the offer (at least where the underlying statute defines "costs" to include attorneys' fees). The Court reasoned that, because attorneys' fees are awarded only to the "prevailing party," a plaintiff who recovers less than the amount offered has not obtained any benefits from the post-offer work of his attorney. The Court also reasoned, and rightly so, that denying recovery of such fees would encourage settlement, because it "will require plaintiffs to 'think very hard' about whether continued litigation is worthwhile." Id. at 11. The proposed legislation has just the opposite effect: because plaintiffs' attorneys may recover fees even if the judgment is less than the settlement offer, they have no particular incentive realistically to evaluate their cases prior to trial. This result is another example of how S. 2104 favors plaintiffs' lawyers over victims of discrimination.

Indeed, Section 9 further discourages settlement by prohibiting the waiver of statutory attorneys fees as a

condition of settlement. This provision reverses Evans v. Jeff D., 475 U.S. 717 (1986), where the Supreme Court held that a district court has the power, in its discretion, to approve a waiver of statutory attorneys fees in the settlement of a case. I agree with the Court that forbidding parties to negotiate statutory fee waivers as part of settlement will unnecessarily "impair the vindication of civil rights" by making settlement less attractive, and by removing one of plaintiffs' bargaining chips. As Chief Judge Wald of the District of Columbia Circuit has noted, there are mechanisms already in place that will protect against unfair results that may arise when plaintiffs or their attorneys feel unfairly compelled to waive attorneys' fees. See Moore v. National Ass'n of Securities Dealers, Inc., 762 F.2d 1093, 1113 (D.C. Cir. 1985) (concurring opinion). In particular, the district judge may require separate negotiations of fees and costs, may refuse to approve a settlement containing simultaneous negotiations, or may refuse to enforce a waiver provision while enforcing the balance of the settlement. These options provide sufficient protection while retaining for the parties the flexibility to negotiate mutually agreed-upon settlements.

Finally, Section 9 overrules Independent Federation of Flight Attendants v. Zipes, 109 S. Ct. 2732 (1989), where the Court held that plaintiffs cannot recover attorneys fees from intervenors unless their challenge is frivolous, unreasonable,

or without foundation. To "correct" this result, the bill would allow the "prevailing party" in the original action -- most likely the plaintiffs -- to recover reasonable attorneys fees and costs incurred in the defense of the judgment or order from the party against whom relief was granted in that action -- most likely employers. This provision makes little sense. There is no sound reason to impose upon employers the burden of paying for another party's unsuccessful litigation.

Section 11

Section 11 contains two provisions. The first provides for broad construction of federal civil rights laws to effectuate the purpose of eliminating discrimination and providing effective remedies. The second prohibits courts from using one civil rights law to limit the rights, procedures, or remedies available under another such law. Both provisions are imprudent.

First, the provision for broad construction of federal civil rights laws to effectuate their purposes simply encourages judicial activism. As the Seventh Circuit has noted, "'[p]olicy does not exist in a vacuum." Walton v. United Consumers Club, 786 F.2d 303, 313 (7th Cir. 1987). Thus, instructing courts to construe statutes on the basis of their purposes invites courts to ignore congressional intent and to substitute their own preferences. This encouragement is

especially inappropriate in the employment context, where courts should be strictly construing legal rules and declining to substitute their judgments for the reasonable judgments of employers.

Second, it is equally important that courts be able to reconcile federal civil rights laws. Reconciliation is essential to preserve a coherent and manageable scheme of laws. Thus, subsequent legislation that is more specific in nature typically should be found to restrict prior legislation that is more general. To prohibit courts from reconciling these statutes ignores fundamental theories of statutory construction and, more importantly, will result in statutory schemes that unnecessarily and improperly interfere with each other.

Section 12

Section 12 reverses the Court's decision in Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989), where the Court, held that 42 U.S.C. § 1981 applies only to race discrimination in the making and enforcement, but not the modification, performance, or termination, of contracts. To the extent that S. 2104 extends the protection of Section 1981 to all aspects of the contractual relationship, I endorse it in principle. At the same time, however, I join with former Solicitor General Charles Fried in cautioning that Section 1981 should not be

allowed unnecessarily to overlap with or undermine the provisions of Title VII or any other federal law regulating race discrimination in contracts. Indeed, as Judge Richard Posner has noted, "employment discrimination law has become exceedingly complex. In part this is because of the overlap between statutes -- Title VII and Section 1981 -- passed in different centuries. It may be questioned whether either statute in its present form comports in today's conditions with the human needs that gave rise to them. The stakes in single-plaintiff employment discrimination cases are small relative to the cost of federal litigation, and the need therefore is for a quick and cheap administrative or arbitral remedy rather than the leisurely, complex, and expensive procedures of full-blown federal court litigation." See Malhotra v. Cotter & Co., 885 F.2d 1305, 1313 (7th Cir. 1989).

Section 13

The purpose of Section 13 of S. 2104 is not entirely clear. It may constitute a recognition that expressly race-based remedies and actions that appear to be permissible under Title VII would be impermissible under Section 1981 as expanded (without this Section). Alternatively, it may constitute a recognition that employers cannot show that affirmative action plans are "essential to effective job performance," and thus constitute a means for insulating

affirmative action plans and the like from the legal rules elsewhere created in S. 2104. In any event, given the controversy that surrounds affirmative action issues, this Section's purpose and effect should be clarified so that it may be properly debated.

Section 15

Section 15 raises serious questions of its own. It purports to make many of the substantive rules created in S. 2104 retroactive to various dates, and instructs that judicial orders entered in the interim be vacated. To the extent that Section 15 upsets final judgments or orders entered in ongoing litigation, it may unconstitutionally interfere with "vested" legal rights. It may also violate separation of powers and due process concerns. In all events, by retroactively imposing legal rules on employment decisions, it is fundamentally unfair. Indeed, it is inconsistent with Section 6's professed concern for the finality of judgments.

Conclusion

Mr. Chairman, and Members of the Committee, I strongly recommend against the adoption of S. 2104. Contrary to its claim, it is not an anti-discrimination law. Rather, it is an engine for discrimination, disruption, and litigation. It practically forces employers to superimpose quotas on their

selection processes; and it denies white males an equal opportunity to challenge discriminatory practices instituted under the guise of a litigated or consent decree. Moreover, it invites courts and administrative agencies to substitute their views for employers' view concerning the need for reasonable selection practices; indeed, it practically compels employers to abandon reasonable selection practices and to adopt inefficient and regimented ones instead. Finally, it mandates protracted litigation of employment discrimination claims, and makes settlement and voluntary compliance less viable solutions. Legitimate victims of employment discrimination do not need these unfair standards; they can prevail as easily under fair rules as unfair rules, and these unfair rules will simply produce mischief of the worst kind.

Senator Edward M. Kennedy
Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510-6300

Re: S. 2104

Dear Senator Kennedy:

Thank you both for inviting me to testify before the Committee concerning the above-referenced bill and for the courtesy that you showed to me on the occasion of my oral testimony. This letter responds to the post-hearing questions that Senators Jeffords and Hatch have posed to me.

Responses to Senator Jeffords' Questions

1. In response to Senator Jefford's first question, I do believe that it is possible constitutionally to obtain finality of litigated or consent judgments containing race-conscious relief. But, to understand why, it is necessary for me first to reiterate exactly what a "judgment" is and thus exactly what it means to have a "final judgment."

A "judgment" is a formal resolution by a court of a legal dispute between the parties to an action. 10 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2651, at 11 (2d ed. 1983). It determines the respective rights and obligations of the parties to each other. Id.; see also Black's Law Dictionary 755 (5th ed. 1979). Such a judgment is "final" when the time for appeal has expired and the parties to the judgment may no longer seek judicial examination of the underlying issues (except pursuant to the narrow terms of Rule 60 of the Federal Rules of Civil Procedure).

This rather basic definition of a "judgment" should make clear why it is possible to obtain "finality" with respect to judgments containing race-conscious relief. The court's judgment, whether litigated or consent, determines the correlative rights and obligations of the parties to the lawsuit -- i.e., the defendant-employer and the plaintiff-class. Once entered, that judgment becomes "final" -- i.e., the parties cannot seek to have it reexamined or altered (except pursuant to the narrow terms of Rule 60).

Of course, the judgment resolves only the claims of the parties to the lawsuit -- i.e., the plaintiff-class vis-a-vis the defendant-employer. It does not resolve the claims of absent third-persons -- e.g., subsequent victims of employment actions taken by the employer pursuant to or in implementation of the terms of the judgment. Thus, while the judgment is "final" as to the parties to the suit (and the initial discrimination claim and prayer for relief by the plaintiff against the defendant cannot be reexamined), the judgment is not "final" as against claims of absent third-persons (because, as to them, it is not a "judgment" at all).

The parties to the lawsuit are, however, entitled to seek to extend the judgment to these absent third-persons (and thus to obtain "finality" with respect to the rights and obligations of those persons as well). The parties may seek to join the non-parties (either individually or as a defendant-class). They may seek to transfer any subsequent suit and have that suit consolidated with the original action. They may seek to have any subsequent claim dismissed as untimely filed (under traditional statute-of-limitations or laches principles). Indeed, they may seek sanctions under Rule 11 of the Federal Rules of Civil Procedure and/or a court's equitable authority where the assertion of a subsequent claim lacks a good faith factual or legal foundation (as, for example, may be true of a subsequent challenge to actions taken pursuant to a judicial decree that has withstood repeated prior legal challenge). But they may not seek to extend the judgment to these absent third-persons without giving them proper notice and a fair opportunity for a meaningful hearing.

For the reasons set forth in my prior written and oral testimony, I do not believe that Section 6 of S. 2104 satisfactorily does so.

2. With respect to Senator Jeffords' second question, I of course do not reject the "finality of judgment" as a worthwhile objective. Finality of judgment is necessary if people are to understand to their respective legal rights and obligations and are to be able to put legal controversies with

others behind themselves. Finality of judgment, however, is not, and should not be, the only concern of our legal system. Accuracy of judgment is, and should be, an equal concern of our legal system, and two hundred years of civil litigation experience in this country demonstrate that concerns for accuracy and finality of judgment are appropriately balanced when persons are not bound by decrees entered in litigation to which they were not party. Indeed, while much has been made of the fact that, prior to Martin v. Wilks, an overwhelming majority of the federal courts of appeals had adopted the "no collateral attack" rule, it is clear, as Professors Wright and Miller have noted, that the "no collateral attack rule" was an extremely isolated and unwise departure from the otherwise unquestioned rule that non-parties may not be precluded for failure to intervene. See 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure section 4452, at 449 (1981).

3. With regard to Senator Jeffords' third question, I believe that allowing subsequent third-person challenges will discourage few, if any, employers and plaintiff-classes from entering into lawful race-conscious orders or decrees. Such orders or decrees will still totally eliminate or greatly reduce an employer's potential back-pay liability to the original plaintiff-class and, indeed, to any subsequent "reverse discrimination" plaintiff (since imposing back pay against actions taken pursuant to judicial orders would be inequitable and, in the case of public employers, contrary to "good faith" immunities). Furthermore, such orders or decrees will still essentially put to rest the delicate and touchy question whether the employer discriminated against the original plaintiff-class, and it will thus encourage the employer and the plaintiff-class to resume productive relations; indeed, because a court will have already approved the race-conscious actions, such orders or decrees will in fact encourage the employer and plaintiff-class to join with each other in resisting any subsequent claims by "reverse discrimination" plaintiffs and, concomitantly, discourage disappointed individuals from even instituting such "reverse discrimination" suits. In all events, any such subsequent "reverse discrimination" plaintiffs will still have to show that the race-conscious actions in issue are unlawful and, under current law, that will be very difficult to do. Thus, while there are certainly costs associated with subsequent challenges to race-conscious actions, those costs are small when compared to the benefits still to be obtained by employers and plaintiff-classes; and, from society's perspective, they are costs inherent in the concept of due process, and our commitment to that concept should cause us to bear them without hesitation.

4. With regard to Senator Jeffords' fourth question, I agree that it will sometimes be difficult to identify all of the persons whose interests will be adversely affected by the entry of a decree or order (or subsequent actions taken in implementation of or pursuant thereto). I further agree that, as a consequence, it will be difficult if not impossible to join these persons or otherwise notify them of the underlying court action. But these real-world problems simply demonstrate the unfairness of Section 6 of S. 2104 (and the wisdom of the decision in Martin v. Wilks).

Under Section 6, a subsequent challenge is precluded to the extent that a court determines that the challengers were "adequately represented" in a prior proceeding or that "reasonable efforts" were made to provide them with notice. This preclusion rule will force "future" employees constantly to be on guard for litigation that may speculatively affect their rights and to respond to any litigation that may even conceivably in the future result in harm to them. Moreover, to the extent they do not learn of such litigation, they will inevitably have to litigate whether they were adequately represented in the lawsuit and whether reasonable efforts were made to notify them of it. Thus, Section 6 will encourage premature and speculative litigation and, concomitantly, introduce extraneous issues into any proceedings that are filed when the injuries at issue actually do occur. By contrast, the decision in Martin v. Wilks allows an individual to wait until his or her claim becomes identifiable and then institute a timely challenge. The latter approach is infinitely fairer and more efficient (and the transfer and consolidation rules can be used to prevent inconsistent adjudicative results).

Neither statutory limits on the duration of litigated or consent judgments nor periodic windows within which collateral claims must be asserted strikes me as a more effective solution to this "identification" problem. As for statutory limits on the duration of judgments or decrees, such limits already exist under extant case law, see, e.g., Johnson v. Transportation Agency, 480 U.S. 616, ___ (1987) (race-conscious remedies must be "temporary measures designed to eliminate racial imbalance"); U.S. 193 (1979); City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 728-729 (1989) (same), and, while they reduce the universe of persons who may be affected in the future by the operation of the judgment or decree, they do not aid in determining the identity of the persons who will actually be affected. As for periodic challenge windows, they too also exist under the current statutory scheme -- they are called statutes-of limitations -- and they aid in the identification of persons affected by a decree only if, as under urrent statute-of-limitations rules, the period for

challenge begins at the time a person knows or should know that an unlawful employment practice has been committed against him (or her); any additional windows would only encourage either premature or stale litigation.

5. With respect to Senator Jeffords' fifth question, an employer should be able to rebut a disparate impact claim by evidence that the selection device in issue is reasonably justified in light of the nature of the job and its relation to the overall business enterprise. I believe that, although employing slightly different formulations over the years, the Supreme Court has consistently placed a similar emphasis on the reasonableness of the employer's business justification. Thus, I approve of the "manifest relationship" test announced in Griggs (though I find the formulation somewhat unhelpful in the context of job qualifications geared toward safety rather than performance, and I thus prefer the formulation employed by the Court in Wards Cove Packing). By contrast, I do not approve of the two alternative formulations proposed in this question -- namely, that there must be "a tight fit between the challenged criterion and the actual demands of a job" or "an overriding legitimate business purpose" for the criterion. These formulations suggest that courts should either be measuring the scientific validity of the selection device in issue or second-guessing management as to the significance of a particular business objective. As explained in my written testimony, I am doubtful that courts are competent to undertake these functions, and I sense that concerns for business efficiency and autonomy should counsel against asking courts to do so.

6. With regard to Senator Jeffords' sixth question, Section 4 of the bill would be slightly more acceptable to me if the definition of "business necessity" was removed altogether. The bill would still be troublesome, of course, to the extent that it continued to allow "multiple practice" challenges and to shift the "burden of proof" to the employer on the business necessity issue. But, if the definition of "business necessity" was removed from Section 4, the definition of the rebuttal burden adopted by the Court in Wards Cove Packing would probably remain good law and, for the reasons set forth in my prior testimony, I am at the present inclined to favor that approach.

7. With respect to Senator Jeffords' second question number 4, I do not agree that the showing made by an employer on business necessity need be in the nature of an affirmative defense. To be sure, in a number of the cases decided after Griggs and before Wards Cove Packing, the Court apparently assumed that "business necessity" is a "defense" to a disparate

impact claim. But the Court had never squarely ruled on the question, and the question was thus an open one. The Court's decision in Wards Cove Packing sensibly resolved it: Leaving the burden of persuasion on the plaintiff is consistent with the general rule that a plaintiff at all times bears the burden of persuading the trier of fact on the basic causation element of a violation -- i.e., that the adverse employment action was "because of" race or sex rather than for a sound business reason; this general rule of causation controls the allocation of the burden of proof in "disparate treatment" cases, and it would be anomolous to impose a heavier burden on a defendant in a case where a neutral policy results in disparate impact than in one where the charge is unlawful animus; and, indeed, requiring an employer to carry the burden of persuasion with respect to its business justifications would be inconsistent with appropriate congressional concern that legitimate managerial prerogatives be preserved.

8. With respect to Senator Jeffords' question number 7, I do not understand S. 2104 to overrule that portion of the Wards Cove Packing decision that held that an improper statistical showing had been made. But it is important to understand that, in requiring a comparison between the qualified applicant pool and those selected, the Court was essentially speaking of minimum qualifications for the positions in question; moreover, it is also important to understand that, in addressing the comparative issue in this fashion, the Court was assuming that a plaintiff would have to show that any disparity between the qualified applicant pool and those selected is causally linked to a particular practice. Thus, while S. 2104 does not appear to disturb the statistical comparison part of the Wards Cove Packing decision, we must recognize that it leaves in place only a minimal threshold burden on a plaintiff and that that threshold by itself is not sufficient -- either legally or statistically -- to show that an employer is in fact responsible for any disparities in the racial or gender composition of its work force.

9. With respect to Senator Jeffords' question number 8, I note that, while the issue of "business necessity" typically arises in disparate impact cases, the courts have not rigidly limited its use to such cases (as S. 2104 would do). On the contrary, following the Supreme Court's suggestion in Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 716 n.30 (1978), the courts have used the "business necessity" analysis to analyze employment policies that do not fit comfortably into any of the traditional methods of Title VII analysis.

For example, a number of courts of appeals (and the EEOC) have found that the lawfulness of fetal protection policies turns on the issue of "business necessity." See, e.g., Wright v. Olin, 697 F.2d 1172, 1185-86 n.21 (4th Cir. 1982); EEOC Policy Guidance on Reproductive and Fetal Hazards, 2 Empl. Prac. Guide (CCH) ¶ 5164, at 6449, 6450-51 (1988). In so finding, the courts have expressly recognized that fetal protection policies involve questions of "disparate treatment"; but the courts have nevertheless held that such policies should be analyzed under the business necessity rubric.

The courts have similarly found the "business necessity" issue relevant in cases where they find that Congress could not possibly have intended to prohibit race-based decisionmaking. For example, the courts are convinced that Congress did not intend to prohibit a police department from selecting a black police officer to perform undercover work in a predominantly black neighborhood. See Miller v. State Bd. of Barber Examiners, 615 F.2d 650, 653-54 (5th Cir.), cert. denied, 449 U.S. 891 (1980). While such an employment decision might involve intentional discrimination on the basis of race, the courts have suggested that "business necessity" could justify the discrimination.

10. With respect to Senator Jeffords' question number 9, I do not agree that a violation of Title VII occurs whenever an impermissible motive causes a person to act. Title VII does not prohibit an employer from being motivated by an individual's race or gender. It prohibits an employer from denying an individual an employment opportunity because of that individual's race or gender. Thus, a violation of the statute occurs only when the consideration of race or gender causes the denial of the employment opportunity; and, concomitantly, no such violation occurs when the employment opportunity would have been denied in any event.

11. With respect to Senator Jeffords' question number 10, neither of the definitional phrases proposed therein lessens or eliminates my objection to Section 5 of S. 2104. My objection to each proposal rests on the same ground -- namely, that each proposal would impose liability when the same employment decision would have been made in the absence of improper considerations. In my view, it is important that the requirement of a causal connection between the improper consideration and an adverse employment action be maintained. Such a requirement ensures that victims, and only victims, of discrimination receive relief; and it ensures that proper respect for managerial prerogatives is maintained. Indeed, it was for these reasons that all nine Justices in Price Waterhouse agreed that there is no violation of Title VII when the employer would have reached the same result absent consideration of unlawful factors.

12. With respect to Senator Jeffords' question number 11, my principal opposition to Section 5 of S. 2104 derives from what I perceive as its establishment of liability without regard for causation. My opposition is intensified, however, by the additional damages and attorneys' fees provisions of the bill. As I stated in my written testimony, the availability of additional attorneys' fees, compensatory damages, and punitive damages will unreasonably increase plaintiffs' expectations and thus decrease the likelihood of settlement with them.

13. With respect to Senator Jeffords' question number 12, the removal of attorneys' fees from the definition of "costs" under Title VII will make it possible for a plaintiff who rejects a Rule 68 offer of judgment to recover post-offer attorneys' fees-- even if the plaintiff ultimately recovers less than the amount offered. This may tempt plaintiffs (and their attorneys) to reject reasonable settlement offers. By contrast, plaintiffs (and their attorneys) who know from the outset that they will be required to bear their own attorneys' fees in the event that they recover less than the amount that the defendant has offered to settle the case will consider any settlement offer from a more realistic posture.

14. With regard to Senator Jeffords' question number 13, I must admit that I have not studied the rules of all 50 states on this issue. I can thus offer only the following comments:

I am informed that at least a few states have ruled that defendants may not, as a condition of settlement, require a waiver or limitation on the recovery of statutory attorneys' fees. See Evans v. Jeff D., 475 U.S. 717, 728 n. 15 (1986); Moore v. National Ass'n of Securities Dealers, 762 F.2d 1093, 1103 (D.C. Cir. 1985). But, as the Supreme Court noted in Evans, not all state bars that have considered this issue have reached the same conclusion. Evans, 475 U.S. at 728 n.15.

It seems clear from the disparate rules that there may be times when the interests of an attorney in receiving his or her fees may be at odds with the interests of a client in settling a case. Nevertheless, I am inclined to agree with the Court that the dilemma is not an ethical one: the attorney's ethical duty is to serve his clients, not to seek statutory attorneys' fees. Evans, 475 U.S. at 1537. Moreover, it would appear that the most sensible and sensitive approach to the issue would be to allow a district court to evaluate the settlement offer in the context of the facts of the case and ensure that the offer does not undermine the policies of the statute. S. 2104's absolute prohibition of mandatory fee waivers goes too far.

15. With regard to Senator Jeffords' question number 14, I continue to endorse in principle the attempt to overrule the decisions in Lorance and Patterson. I offer the following additional comment:

(a) With respect to Patterson, S. 2166 expressly codifies the holding of Runyon v. McCrary, 427 U.S. 160 (1976), and thus puts the issue of whether Section 1981 applies to discrimination by private actors forever behind us. S. 2104 fails to do so (and thus leaves open the possibility that a majority of the Court could decide that Runyon should be overruled).

(b) With respect to Lorance, S. 2166 provides that, for purposes of the statute-of-limitations provisions, an unlawful employment practice occurs when an intentionally discriminatory seniority system is adopted, when an individual becomes subject to it, or when the person is injured by its application. By contrast, S. 2104 provides that, for all purposes, an unlawful employment practice occurs when an intentionally discriminatory seniority system that is part of a collective bargaining agreement is applied during the period that that agreement is in effect; and it further provides that the statute-of-limitations begins to run from the later of the occurrence of the unlawful employment practice or the application of the unlawful employment practice adversely to affect the individual. Thus, S. 2166 applies to all seniority systems, while S. 2104 is limited to seniority systems in collective bargaining agreements; and S. 2166 limits its amendment to the statute-of-limitations issue ruled upon in Lorance, while S. 2104 goes further and redefines the concept of an unlawful employment practice for all purposes and imposes a far-reaching statute-of-limitations rule on top of it.

(c) I am not inclined to prefer either bill over the other. While both bills are a step in the right direction, they both omit necessary elements of statutory reform and S. 2104, at least, contains serious flaws. Moreover, both bills fail to harmonize Title VII with Section 1981. Finally, neither bill clearly states that the statute-of-limitations starts running when an individual knows or should know that an intentionally discriminatory seniority system will specifically be applied to him or her. I suggest that both bills need improvement in at least these respects.

Responses to Senator Hatch's Questions

1. With regard to Senator Hatch's first question, I believe that Mayor Arrington's concerns are unfounded. As explained in my response to Senator Jeffords' third question,

employers and plaintiff-classes still have powerful incentives voluntarily to settle equal employment opportunity claims and promptly to remedy prior discrimination against plaintiff-classes. They will, of course, have to defend against claims that, in doing so, they have unlawfully abridged the rights of absent third-persons. But, for the reasons set forth above, that should not discourage them from implementing lawful race-conscious remedies.

2. With regard to Senator Hatch's second question, I do believe that Section 6 creates a double standard. Section 6 would not preclude the relitigation of issues addressed in a consent decree by members of a class represented or sought to be represented in the action wherein the consent decree was entered. Nor would it preclude relitigation of issues addressed in a consent decree by members of a group on whose behalf relief was sought by the Federal government. Instead, Section 6 would bar subsequent litigation only by those whom no party sought to represent. This is a double -- indeed, an irrational -- standard.

3. With respect to Senator Hatch's third question, I have reviewed the statement by 15 law professors concluding that Section 6 is constitutional. The statement appears quite superficial to me.

First, the 15 law professors assume that notice "from any source" that one's interests "might" be affected by a consent decree is sufficient to comport with due process. As I explained in my written testimony, however, due process requires more. Due process requires that an individual receive notice such that it will "apprise [the person] of, and permit adequate preparation for, an impending 'hearing.'" Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 14 (1978). S. 2104 does not, and indeed does not purport to, require such notice.

Second, the professors assume that an opportunity to present objections to a consent decree or order prior to its entry is constitutionally sufficient. In fact, it is insufficient. In circumstances like these, due process requires more (such as a right to discovery, confrontation, cross-examination, presentation of testimony, and argument).

Third, the professors assume that due process never requires notice of a proceeding where the individual is adequately represented by someone else. They are wrong. While that may be true in limited circumstances, it generally is not. Thus, while individual notice is not required in the context of class actions initiated under Rules 23(b)(1) and (2)

of the Federal Rules of Civil Procedure, it is required under Rule 23(b)(3) of those rules; and, as Professors Wright and Miller make clear in their celebrated treatise, that requirement is constitutionally mandated. See 7B C. Wright, A. Mill, & M. Kane, Federal Practice and Procedure, section 1786, at 188-194 (2d ed. 1986). Rule 23(b)(3), of course, is the rule that would be almost always be applicable in these kind of cases.

Finally, the law professors conclude that the interests of individuals affected by the consent decree are outweighed by the need to promote settlement of claims and the danger of inconsistent and contradictory proceedings. I disagree. These policies are appropriate goals. But, for the reasons set forth in my written testimony, they can be fully achieved without depriving individuals of their proper day-in-court.

4. With regard to Senator Hatch's fourth question, I do not believe that Section 6 comports with the requirements of Mullane. It does not require that individuals be given personal notice where reasonably possible. It does not require that any notice given adequately allow an individual to prepare for a hearing. It allows individuals to be precluded from subsequent lawsuit even though the actions that would give rise to their injuries have not yet occurred. And, finally, it does not provide for a hearing that is appropriate to the nature of the case, that occurs at a meaningful time, and that takes place in a meaningful manner.

5. With regard to Senator Hatch's fifth question, I completely agree with former Solicitor General Fried that the impulse behind Section 7 of S. 2104 is inconsistent with the impulse behind Section 6. Section 7 establishes that the statute-of-limitations on a claim of discrimination does not begin to run until the later of the date of occurrence and the date of application; the idea is that an individual should not have to speculate about whether an unlawful employment practice will be applied to him or her. Section 6, by contrast, requires an individual to initiate suit prior to either the occurrence or the application of an intentionally discriminatory act; stated differently, it would have the statute-of-limitations conclude before it has even begun to run. The inconsistency is indefensible.

6. With respect to Senator Hatch's sixth question, the issue of which party bears the burden of proof on the issue of "business necessity" in disparate impact cases is quite important. From a technical standpoint, of course, the allocation of the "risk of non-persuasion" will be

determinative in only a limited number of cases. But, as a policy matter, these are precisely the cases in which employment practices should be sustained. Courts are not competent to restructure business practices, and they should not be allowed, in cases of evidentiary doubt, to substitute their judgments for those of employers concerning the need for particular selection devices. Thus, where the evidence about the necessity of a business practice is in equipoise, courts should defer to the judgment of the employer about the wisdom of using that practice. Doing so will promote efficiency and excellence.

7. With respect to Senator Hatch's seventh question, I believe that, if enacted, S. 2104 would effectively gut § 703(j) of the statute. Section 703(j) provides that an employer cannot be required to grant preferential treatment to a person because of the individual's race or sex simply because an imbalance exists in the number or percentage of protected-group persons in the workforce in comparison to the number or percentage of protected-group persons in the community or available work force. Section 4, however, would, in effect, require employers to do just that. As I explained in my written testimony, employers faced with the possibility of "multiple practice" challenges under Section 4, pursuant to which the employer will be required to "prove" that each of its practices is "essential to effective job performance," will have little choice but to superimpose race and gender quotas on to their selection practices. This is precisely the type of practice that § 703(j) recognizes should not be required or encouraged.

8. With respect to Senator Hatch's eighth question, Section 13 of S. 2104 does not relieve my concerns that S. 2104 will lead to quota hiring and promotions. On the contrary, Section 13 only heightens my concerns. Section 13 purports to insulate affirmative actions plans and actions from all of the rules created in S. 2104. Thus, Section 13 provides a blanket cover for the engines through which quota hiring and promotions will be accomplished.

Sincerely,

Glen D. Nager

The CHAIRMAN. Mr. Larson.

Mr. LARSON. Senator Kennedy, when a plaintiff's lawyer is forced to waive fees, Mr. Nager will still be paid. He bills on 30-day billing. He will still be paid. As a matter of fact, if he loses the case he will still be paid. From the plaintiff's perspective, civil rights litigation is quite different.

I would like to summarize, Senator Kennedy, Senator Simon, and Senator Adams, a few of the points in the rather lengthy prepared statement that I have submitted for the record.

There are many points of this legislation, the substantive aspects of this legislation, which would become but hollow pronouncements, unable to be enforced by the victims of discrimination, unless Congress restores to this legislation the incentives of court-awarded attorneys' fees that are going to attract competent counsel to return to representing the victims of employment discrimination.

The backbone of civil rights enforcement used to come from a number of mid- to small-sized law firms that developed a civil rights expertise and litigated for the potential of court-awarded attorneys' fees, representing the victims of civil rights violations.

The deterrents to this type of practice are at least threefold. First, the economics of not doing 30-day billing. Instead, the plaintiff's lawyers are going to be paid only if they win. Additionally, they are going to be paid only after they win. Indeed, they are going to be paid not just after they win, but after the end of a second litigation over attorneys' fees, which defense counsel usually engage in.

Another barrier to fee entitlement for plaintiffs' lawyers is the problem of the recent U.S. Supreme Court decisions over the last couple of years that restrict entitlement to fees and certainly limit the amount. No recovery for expert fees; no recovery in a settlement where a defense lawyer coerces a waiver of attorneys' fees from a plaintiff's lawyer; no recovery in postjudgment challenges, etc.

Both of these types of barriers bring about the economic realities of practice in these firms. The landlord still has to be paid; telephone bills have to be paid; computer services, photocopying, support staff have to be paid. Even the associate attorneys and hopefully the partners would be paid, at least a little. They've got to pay off the interest on the debt that has accumulated in litigating, for thousands of hours, these complex cases. And of course, you have got to pay the expenses that are needed to litigate on behalf of the impecunious clients.

Now, Congress of course cannot solve all these problems; they are immense. But Congress can help by restoring the original congressional incentive of court-awarded fees to attract competent counsel back to represent the victims of employment discrimination. And this legislation does help to do so, in five ways.

First, it expressly authorizes expert witness fees and other expenses of litigation. This I discuss at pages 7 to 11 of the prepared statement. This in fact would do nothing different than what this Congress has already done in 28 other fee-shifting statutes simply by expressly authorizing expert witness fees and other expenses.

Second, this legislation bars a cut-off of fee recovery following a rule 68 rejected offer of judgment. Through a change of the statutory language, simply by not making fees part of costs, Congress could accomplish this objective, as it has already done in more than 50 other fee-shifting statutes. This is no monumental change. This is just bringing title VII in line.

Third, this legislation prevents coerced waivers of attorneys' fees in court-approved settlements, instances where plaintiffs' lawyers expend thousands of hours of work only to be forced out of all fees altogether, while defense lawyers, of course, are paid on 30-day billing.

Fourth, this legislation allows fees and challenges to court orders and judgments. This is the *Flight Attendants* v. *Zipes* problem which we have discussed and which, for example, in the *Flight Attendants* case, involved the lawyers in roughly 10 years of litigation both with regard to the judgment on the merits and then second, with regard to fees. Having ultimately lost with regard to fees for defending the judgment, they lost fees for 10 years of litigation altogether; no compensation. This legislation would simply allow plaintiffs' counsel to be reimbursed as they should be.

And fifth, this legislation authorizes for delay in payment, interest, against the Federal Government, the same as is already available against State governments or as against local governments or particularly against private employers. This simply equalizes title VII liability, making the Federal Government responsible in the same way as other employers.

I'd like to conclude briefly by pointing out that a couple of years ago I wrote a couple of books—one on attorneys' fees, which thrust me into this process and has forced me to testify before you, Senator Kennedy, on a number of occasions and, back in the Eighties, before Senator Hatch with regard to his misnamed "Legal Fees Equity Act" on a number of occasions.

I wrote another book. I wrote a book on employment discrimination that was directed at a lay audience, and I had a chapter in there called "Finding a Lawyer" or "How to Find a Lawyer" or something like that. In that chapter I listed 12 of the leading small to midsized law firms that were doing civil rights litigation and in particular doing a substantial amount of employment discrimination litigation—12 of those firms—and I described them, the types of illustrative cases, etc. Ten years later, eight of those firms no longer exist. Most have gone bankrupt, out of business, waiting for court-awarded attorneys' fees. And these were good, experienced lawyers. Of the remaining four, they do many fewer title VII cases today than ever before.

This is not just my conclusion. As I point out in my prepared statement, Ray Terry, a 20-year veteran employment discrimination lawyer, now head of the EEOC office in Memphis, points out that plaintiffs', title VII, lawyers are an endangered species and in many parts of the country are already extinct, and it is true.

Also I point out in my testimony that Federal Judge Myron Thompson in Alabama, in a decision rendered this past November, points out that in his experience, very soon, plaintiffs' civil rights lawyers in the State of Alabama will be nothing but a memory.

Senator Kennedy, I appreciate the opportunity to testify. Again, the substantive provisions of this legislation are very important, but they should not be allowed to become mere hollow pronouncements. Enforcement incentives must be restored, and the fees provisions accordingly must be enacted.

Thank you.

[The prepared statement of Mr. Larson follows:]

MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND ("MALDEF")
E. RICHARD LARSON ON BEHALF OF

Chairman Kennedy and other Members of the Committee, I am E. Richard Larson, Vice President for Legal Programs of the Mexican American Legal Defense and Educational Fund ("MALDEF"). Thank you for inviting me to testify on this most important legislation, S. 2104, titled the Civil Rights Act of 1990. MALDEF fully endorses and urges swift enactment of this legislation.

In this Statement, I will address the five provisions in this legislation which affect statutory awards of attorneys fees under Title VII of the Civil Rights Act of 1964. The five provisions together help to restore the original congressional purpose for authorizing statutory fee shifting in the first place.

Section 9 of the Act, titled Clarifying Attorney's Fees Provision, amends § 706(k) of the Civil Rights Act of 1964 in four ways: (1) by expressly authorizing recovery of expert fees and other litigation expenses; (2) by barring an absolute cutoff of fee recovery following a rejected offer of judgment; (3) by preventing coerced waivers of fees in court-approved settlements; and (4) by allowing fees for time expended in defending challenges to a court order or judgment granting relief.

A fifth change, through Section 10 of the Act, titled in part Providing for Interest ... in Actions Against the Federal Government, which amends § 717(d) of the Civil Rights Act of 1964, authorizes interest against the federal government to compensate for delay in payment the same as is available against non-federal parties, a provision which reduces the delay-in-payment penalty of post-litigation fee collection.

Following a brief review of the theory and current reality of statutory fee shifting, I will discuss each of the foregoing provisions and particularly the need therefor.

A. The Theory and Current Reality of Statutory Fee Shifting

The purpose of statutory fee shifting is not to provide a windfall to lawyers, but instead to provide a carrot-like financial incentive to "attract competent counsel" to represent the victims of civil rights violations.[1] As Congress recognized nearly fifteen years ago, our "civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important congressional policies which these laws contain."[2] Stated otherwise: "If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases."[3]

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1. S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976), accompanying The Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, amending 42 U.S.C. § 1988. See also H.R. Rep. No. 1558, 94th Cong., 2d Sess. 9 (1976) (statutory fee shifting is intended to "insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights").

2. S. Rep. No. 1011 at 2. See also H.R. Rep. No. 1558 at 1 ("The effective enforcement of federal civil rights statutes depends largely on the efforts of private citizens").

3. S. Rep. No. 1011 at 6. See also H.R. Rep. No. 1558 at 1 ("Because the vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees, [statutory fee shifting] is designed to give such persons effective access to the judicial process where their

The intent of Congress, however, has not been fulfilled. Instead, Congress' intent has been repeatedly and severely undermined by Supreme Court decisions rendering the economically viable practice of civil rights law all but impossible. This reality has been particularly devastating to the practice of employment law.

In FY 1976, private counsel filed 1,174 employment discrimination class actions in federal court; ten years later in FY 1987 only 48 such cases were filed.[4] The cause of this precipitous decline in the filing of cases has been not the absence of employment discrimination but the fact that plaintiff's lawyers have become "an endangered species."[5]

The "dearth of competent counsel willing to represent victims of discrimination" and its concomitant effect of "continuing to undermine civil rights legislation" were recently commented upon

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grievances can be resolved according to law.").

4. Compare, Director of the Administrative Office of the United States Courts, 1976 Annual Report, Table 32, 239 (1976), with Director of the Administrative Office of the United States Courts, 1987 Annual Report, Appendix I, Table X-5, 140 (1987).

5. R. Terry, "Eliminating the Plaintiff's Attorney in Equal Employment Litigation," 5 The Labor Lawyer 63 (1989). Mr. Terry, Regional Attorney for the EEOC in Memphis, Tennessee, summarized the problem as follows: "The single most significant development in equal employment law has been the erosion of the ground from under plaintiffs' counsel, particularly in the area of a prevailing plaintiff's recovery of attorney fees. The situation has deteriorated to such a degree that private counsel representing plaintiffs in equal employment cases have become an endangered species, in many places already extinct." Id.

by a federal judge in Alabama.[6] Despite increased requests from potential plaintiffs with "meritorious suits,"[7] the number of attorneys willing to undertake such representation was actually decreasing,[8] suggesting that "the day will soon arrive when the

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6. Robinson v. Alabama State Department of Education, No. 86-T-569-N, slip op. at 17 (M.D. Ala. Nov. 27, 1989).

7. Id. at 18. As summarized by Judge Myron Thompson: "Attorneys handling civil rights cases reported that neither they nor the other competent civil rights counsel within the state could handle all of the potentially meritorious suits presented to them; they said that they received approximately 15 telephone calls a week seeking to obtain their representation." Id. "As a result of this scarcity [of available attorneys], plaintiffs often had great difficulty attracting competent counsel to handle their cases." Id. (brackets added).

8. Id. at 20. Judge Thompson observed:

> Of the few attorneys most highly regarded as civil rights practitioners in the State of Alabama, at least three have redirected their energies toward other legal disciplines within the last few years. Their stated motivation was that the civil rights market did not adequately compensate them. Unfortunately, the shift of these experienced practitioners was not offset by an influx of new attorneys willing to fill the void. Young attorneys, equally adept at making the same market comparisons as other practitioners, have also shied away from the civil rights field in favor of other, more lucrative and financially stable specialties.
>
> There has been, as a result, almost a 10% reduction in the number of civil rights attorneys within the state within the past few years. If this pattern continues unchecked, and the evidence before the court suggests that it will unless corrective measures are taken, the day will soon arrive when the state's civil rights bar will be little more than a memory. Ultimately, the real victims of this trend will be the citizenry of Alabama. Without lawyers available to champion the cause of impecunious victims of

state's civil rights bar will be little more than a memory. Ultimately, the real victims of this trend will be the citizenry of Alabama."[9]

The economics of representing civil rights plaintiffs[10] coupled with the ordinarily protracted duration of fact-intensive

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> discrimination, the progress that has been made during the past four decades toward eradicating discrimination from this state will be halted, and the promise of equal treatment and opportunity for all will be but empty words.

Id. at 20-21 (emphasis by Judge Thompson) (footnote omitted).

9. Id. at 20.

10. In law firms in which even just a few attorneys represent non-fee-paying clients based upon the potential award of statutory fees at the end of the litigation, the economic burdens can be overwhelming: photocopy machines and computers must be maintained and updated; landlords and telephone companies must be kept happy; even small law libraries are enormously expensive to maintain; interest on accumulated debt often has to be paid; and secretaries, law clerks, paralegals, associates, and even partners have to be paid. Rarely are these firms out of debt. See generally Brief of Twelve Small Private Civil Rights Law Firms Amici Curiae in Pennsylvania v. Delaware Valley Citizens's Council, 483 U.S. 711 (1987); see also Legal Fees Equity Act: Hearing on S. 2802 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 98th Cong., 2d Sess. 376-400 (1984) (testimony of Charles Victor McTeer); Attorney's Fees Awards: Hearing on S. 585 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 97th Cong., 2d Sess. 53-54 (testimony of Fletcher Farrington).

As Justice Brennan reminded us in his dissent in Evans v. Jeff D., 475 U.S. 717, 758 (1986) (footnote omitted): "It does not denigrate the high ideals that motivate many civil rights practitioners to recognize that lawyers are in the business of practicing law, and that, like other business people, they are and must be concerned with earning a living."

employment discrimination litigation[11] do not at all make the representation of impecunious victims of discrimination an attractive pursuit. Added to this unattractiveness are the fact that civil rights lawyers often have to incur substantial debt while litigating even a single case,[12] and the fact that a practitioner who becomes dubbed a "civil rights lawyer" faces the very real problem of no longer being able to attract fee-paying

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11. One of the employment cases addressed by the instant legislation, Wards Cove Packing Co. v. Atonio, 490 U.S. ___, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989), was fifteen years old at the time of the Supreme Court's decision; the impecunious plaintiffs of course had not yet won; and their lawyers thus were not yet even entitled to apply for court-awarded fees.

Another of the employment cases addressed by this legislation, Independent Federation of Flight Attendants v. Zipes, 491 U.S. ___, 109 S.Ct. 2732, 105 L.Ed.2d 639 (1989), was filed in 1970 and settled in 1979; only to be followed by another decade of litigation, first, in defending the consent judgment and, thereafter, over entitlement to attorneys fees, a decade of litigation for which plaintiffs' counsel now can recover no statutory fees.

12. An "illustration" of such debt incurred in a civil rights case was provided by the Supreme Court in Missouri v. Jenkins, 491 U.S. ___, 109 S.Ct. 2453, 105 L.Ed.2d 229 (1989):

> The present case provides an illustration. During a period of nearly three years, the demands of this case precluded [plaintiffs'] attorney Benson from accepting other employment. In order to pay his staff and meet other operating expenses, he was obliged to borrow $633,000. As of January, 1987, he had paid over $113,000 in interest on this debt, and was continuing to borrow to meet interest payments.

105 L.Ed.2d at 240 n.6 (brackets added). See also supra note 10.

commercial clients.[13]

Not all of the foregoing disincentives to representing the victims of employment discrimination in civil rights litigation can, of course, be cured by Congress. But Congress can restore some of the congressionally intended incentive to attract competent counsel by nullifying or at least ameliorating the regressive effect of a series of Supreme Court decisions limiting and even denying the recoverability of statutory fees.

B. Attorney's Fees Amendments

Sections 9 and 10 of the Act make five changes affecting the recoverability of fees in Title VII cases. These changes, the adverse Supreme Court precedents being nullified in part, and the need for the changes are addressed hereafter.

1. Expert Fees and Other Expenses of Litigation

Section 9(2) inserts "(including expert fees and other litigation expenses)" after "attorney's fee," thereby expressly authorizing the courts to award "a reasonable attorney's fee (including expert fees and other litigation expenses)."

Prior to 1987, the lower federal courts both under Title VII

13. Representing plaintiffs in civil rights cases is ordinarily viewed "as very undesirable because it stigmatizes an attorney as a 'civil rights lawyer' and thus tends to deter fee-paying clients, particularly high-paying commercial clients, from seeking assistance from that lawyer." Stokes v. City of Montgomery, 706 F. Supp. 811, 815 (M.D. Ala. 1988), aff'd, 891 F.2d 905 (11th Cir. 1989). See also Hidle v. Geneva County Board of Education, 681 F. Supp. 752, 756 (M.D. Ala. 1988); York v. Alabama State Board of Education, 631 F.Supp. 78, 85 (M.D. Ala. 1986).

and in other civil rights cases routinely awarded to prevailing plaintiffs the expert witness fees and other litigation expenses incurred, either as part of taxable costs,[14] or as included within the attorneys fee award.[15] In 1987, however, The Supreme Court ruled in Crawford Fitting Co. v. J.T. Gibbons, Inc.,[16] that absent express congressional authorization, the courts may not award full expert witness fees as part of taxable costs under Rule 54(d) of the Federal Rules.[17] Although the Court did not expressly rule that

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14. See generally Bartell, "Taxation of Costs and Awards of Expenses in Federal Court," 101 F.R.D. 553 (citing cases).

15. See, e.g., Heiar v. Crawford County, 746 F.2d 1190, 1203 (7th Cir. 1984); Ramos v. Lamm, 713 F.2d 546, 559 (10th Cir. 1983).

16. 482 U.S. 437 (1987).

17. Rule 54(d) of the Fed. R. Civ. P. provides in relevant part:

> Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs.

Two statutes are relevant to the taxation of costs under Rule 54(d). First, 28 U.S.C. § 1920 lists a number of items which may be taxed. Included in § 1920(3) are: "Fees and disbursements for printing and witnesses."

Second, witness fees are further defined in 28 U.S.C. § 1821(b), which states that a witness in attendance at any court "shall be paid an attendance fee of $30 per day for each day's attendance" and for travel time attendant thereto.

Reading these three provisions together, the Supreme Court in Crawford Fitting described them as follows:

> The logical conclusion from the language and interrelation of these provisions is that § 1821 specifies the amount of the fee that must be tendered to a witness, § 1920 provides that the fee may be taxed as a cost, and Rule 54(d) provides that the cost shall be taxed

full expert witness fees and other litigation expenses could not be recovered as part of an attorney's fee,[18] the analysis applied by the Court seems to compel that conclusion,[19] with the result that virtually all of the federal courts of appeals addressing this issue after Crawford Fitting have ruled that full expert fees and other necessary expenses of litigation may not be recovered as part of an attorneys fee award.[20]

> against the losing party unless the court otherwise directs.

482 U.S. at 441.

18. Crawford Fitting, 482 U.S. at 446 n. 1 (Marshall, J., dissenting); see also id. at 445 (Blackmum, J. concurring).

19. The Supreme Court's analysis was based both on congressional action and on the Court's prior precedent. As to congressional action, the Court asserted that in enacting "§§ 1920 and 1821, Congress comprehensively addressed the taxation of fees for litigants' witnesses," with the result that "federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920." Crawford Fitting, 482 U.S. at 442, 445.

Supporting this conclusion was the Court's precedent in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), where the Court held that the federal courts were generally not empowered to award attorney's fees in the absence of express congressional authorization. Relying on Alyeska, the Court in Crawford Fitting pointed out:

> Although Congress responded to our decision in Alyeska by broadening the availability of attorney's fees in the federal courts, see the Civil Rights Attorney's Fees Awards Act of 1976, it has not otherwise "retracted, repealed, or modified the limitations on taxable fees contained in [§§ 1821 and 1920]."

482 U.S. at 444 (citations omitted)(brackets added).

20. See, e.g., West Virginia University Hospitals, Inc. v. Casey, 885 F.2d 11 (3d Cir. 1989), cert. granted, 58 U.S.L.W. 3545 (U.S. Feb. 26, 1990) (No. 89-994); Denny v. Westfield State College, 880

The inability to recover expert fees and other litigation expenses when plaintiffs win their lawsuits presents a substantial deterrent to attracting competent counsel to represent the victims of employment discrimination. The reasons are obvious.

First, the practical reality that expert testimony is often indispensable to the resolution of complex litigation[21] is particularly true in employment discrimination lawsuits, which ordinarily require consultation with and testimony from such experts as statisticians, psychometricians, and labor economists.[22]

Second, the fees and expenses covering these and other

F.2d 1465 (1st Cir. 1989); Gilbert v. City of Little Rock, 867 F.2d 1062 (8th Cir. 1989) (en banc) (affirming District Court by equally divided vote); Sevigny v. Dicksey, 846 F.2d 953 (4th Cir. 1988); Glenn v. General Motors Corp., 841 F.2d 1567 (11th Cir. 1988), cert. denied, 488 U.S. ___, 109 S.Ct. 378, 102 L.Ed.2d 367 (1988); LeRoy v. City of Houston, 831 F.2d 576 (5th Cir. 1987), cert. denied, 486 U.S. ___, 108 S.Ct. 1735, 100 L.Ed.2d 199 (1988); but see Friedrich v. City of Chicago, 888 F.2d 511 (7th Cir. 1989).

21. Ironically, this was true even in Crawford Fitting. As Justice Marshall pointed out in his dissent, the District Court in this case had found the "the expert testimony was 'indispensable to the determination of [the] issues in the case.'" 482 U.S. at 446 (brackets by Marshall, J.).

22. See, e.g., Kraszewski v. State Farm Insurance Co., 38 Fair Empl. Prac. Cases 197, 258 (N.D. Cal. 1985), where the District Court observed, after relying extensively on the testimony of a labor economist and of a statistician: "Statistical evidence played a major role in this action. The use of such evidence is clearly appropriate, for statistical analysis has always served an important function in Title VII litigation." See also Hazelwood School District v. United States, 433 U.S. 299 (1977); Teamsters v. United States, 431 U.S. 324 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

litigation services invariably total tens of thousands of dollars.[23] If these fees and expenses cannot be recovered in successful litigation, the cases simply won't be brought in the first place.

In apparent recognition of this reality, Congress has frequently expressly authorized the recoverability of expert fees and other litigation expenses when enacting or amending fee-shifting statutes.[24] Congress now simply needs to do the same with regard to Title VII. This bill accomplishes that purpose.

2. Fee Awards Subsequent to a Rejected Offer of Judgment

Sections 9(2)&(3) of the Act amend § 706(k) so as to authorize attorneys fees not as part of the costs, but instead to authorize attorneys fees and costs. This change is not cosmetic, but

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23. See, e.g., Thornberry v. Delta Airlines, Inc., 676 F.2d 1240, 1245 (9th Cir. 1982) ($83,918 in expenses primarily for "expert computer witnesses" which the trial court found to be "essential" to proving plaintiff's Title VII case), vacated on other grounds, 461 U.S. 952 (1983).

24. The Equal Access to Justice Act, for example, authorizes "fees and other expenses, in addition to any costs awarded," 28 U.S.C. § 2412(d)(1)(A), and thereafter adds an illustrative definition:

> "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees.

Id. at § 2412(d)(2)(A). For a list of similarly worded statutes, see International Woodworkers of America v. Champion International Corp., 790 F.2d 1174, 1179 n.7 (5th Cir. 1986) (en banc) (listing twenty-eight fee-shifting statutes which expressly authorize expert fees and other expenses), aff'd sub nom., Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987).

significant in its interplay with Rule 68 of the Federal Rules of Civil Procedure as interpreted by the Supreme Court.

Rule 68 authorizes a defendant to make a written offer of judgment to a plaintiff at any time up to ten days before trial, and further provides with regard to rejected offers:

> If the judgment finally obtained by the [plaintiff] is not more favorable than the offer, the [plaintiff] must pay the costs incurred [by the defendant] after the making of the offer.[25]

Although this language of Rule 68 nowhere includes any reference to a statutory attorneys fee, the Supreme Court ruled in 1985 in Marek v. Chesny,[26] first, that the word "costs" in Rule 68 does include attorneys fees where a fee-shifting statute authorizes attorneys fees "as part of the costs,"[27] and second, that under this interpretation civil rights plaintiffs "who reject an offer more favorable than what is thereafter recovered at trial will not recover attorney's fees for services performed after the offer is rejected." [28]

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25. Fed. R. Civ. P. 68 (brackets added).

26. 473 U.S. 1 (1985)

27. As summarized by the Court: "Thus, absent congressional expressions to the contrary, where the underlying statute defines costs' to include attorney's fees, we are satisfied such fees are to be included as costs for purposes of Rule 68." 473 U.S. at 9.

28. 473 U.S. at 10. This interpretation, the Court opined, was consistent with statutory fee-shifting policy at least with regard to cutting off fees to a prevailing plaintiff. 473 U.S. at 11.

The problems with the Court's decision in Marek, as set forth in Justice Brennan's dissent,[29] are at least threefold.

First, because some statutes such as Title VII authorize fees as part of the costs where dozens of other statutes authorize fees and costs, or in addition to costs,[30] the Court's decision produces "absurd variations in Rule 68's operation based on nothing more than picayune differences in statutory phraseology."[31]

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29. 473 U.S. at 13-51 (dissenting opinion of Brennan, J., joined by Marshall, J., and Blackmum, J.).

30. Compare 473 U.S. at 44-48 (Appendix A to Justice Brennan's dissent, Attorney's Fees Referred to as "Costs"), with 473 U.S. at 48-51 (Appendix B to Justice Brennan's dissent, Attorney's Fees Not Referred to as "Costs").

31. 473 U.S. at 14-15 (Brennan, J., dissenting). These absurd variations were elaborated upon by Justice Brennan later in his opinion, 473 U.S. at 23 (footnote omitted) (emphasis by Justice Brennan):

> Congress has enacted well over 100 attorney's fees statutes, many of which would appear to be affected by today's decision. As the Appendix to this dissent illustrates, Congress has employed a variety of slightly different wordings in these statutes. It sometimes has referred to the awarding of "attorney's fees as part of the costs," to "costs including attorney's fees," and to "attorney's fees and other litigation costs." Under the "plain language" approach of today's decision, Rule 68 will operate to include the potential loss of otherwise recoverable attorney's fees as an incentive to settlement in litigation under these statutes. But Congress frequently has referred in other statutes to the awarding of "costs and a reasonable attorney's fee," of "cost together with a reasonable attorney's fee," or simply of "attorney's fees" without reference to costs. Under the Court's "plain language" analysis, Rule 68 obviously will not include the potential loss of otherwise recoverable attorney's fees as a settlement incentive in

Second, the Court's interpretation is at variance with the uniform statutory directive that attorneys fees be awarded by a court, and not be subject to taxation of costs by the clerk of court on one day's notice.[32]

Finally, and of primary importance with regard to the enforcement of civil rights statutes such as Title VII, the Court's decision places severe pressure upon civil rights plaintiffs to respond to early offers of judgment without adequate discovery into or knowledge about the extent of the defendants' illegal activity and ultimate liability.[33] The obvious effect is not to further the

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> litigation under these statutes because they do not refer to fees "as" costs.

32. As summarized by Justice Brennan, 473 U.S. at 19-20 (footnote omitted) (emphasis by Justice Brennan):

> The Rules provide that "costs" may automatically be taxed by the clerk of the court on one day's notice, Fed Rule Civ Proc 54(d) -- strongly suggesting that "costs" were intended to refer only to those routine, readily determinable charges that could appropriately be left to a clerk, and as to which a single day's notice of settlement would be appropriate. Attorney's fees, which are awardable only by the court and which frequently entail lengthy disputes and hearings, obviously do not fall within that category.

33. This reality was recognized by Justice Brennan in his dissent, 473 U.S. at 31:

> The Court's decision inevitably will encourage defendants who know they have violated the law to make "lowball" offers immediately after suit is filed and before plaintiffs have been able to obtain the information they are entitled to by way of discovery to assess the strength of their

congressional policy of encouraging the vindication of civil rights, but to deter it:

> Requiring plaintiffs, to make wholly uninformed decisions on settlement offers, at the risk of automatically losing all of their postoffer fees no matter what the circumstances and notwithstanding the "excellent" results they might achieve after the full picture emerges, will work just such a deterrent effect.[34]

This deterrent effect is only magnified each time a Title VII plaintiff and her attorney guess wrong in rejecting an early offer of judgment, thereby being unable to recover hundreds of thousands of dollars in fees, after winning hard-fought litigation.[35]

To remedy this problem, while at the same time furthering the congressional policy of encouraging the vindication of the civil rights of persons victimized by employment discrimination, Congress

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> claims and the reasonableness of the offers. The result will put severe pressure on plaintiffs to settle on the basis of inadequate information in order to avoid the risk of bearing all of their fees even if reasonable discovery might reveal that the defendants were subject to far greater liability.

34. 473 U.S. at 32 (Brennan, J., dissenting) (footnotes omitted) (emphasis by Justice Brennan).

35. See, e.g., Spencer v. General Electric Co., ___F.2d___, 58 U.S.L.W. 2420 (4th Cir. Jan. 16, 1990) (involving a cutoff under Rule 68 of approximately $380,000 in fees).

needs only to alter the statutory language in § 706(k) from an authorization of attorneys fees as part of the costs to an authorization of attorneys fees and costs. The latter language, in fact, has already been used by Congress in dozens of statutes ranging from the Fair Labor Standards Act[36] to the Motor Vehicle Information and Cost Savings Act.[37] This bill accomplishes the same purpose for Title VII.

3. Coerced Waivers of Fees in Settlements

Section 9(4) of the Act adds to § 706(k) a new second paragraph, as follows:

> (2) A court shall not enter a consent order or judgment settling a claim under this title, unless the parties and their counsel attest that a waiver of all or substantially all attorneys' fees was not compelled as a condition of the settlement.[38]

This clarifying addition to § 706(k) is quite obviously designed to prevent defendants and particularly defense counsel, at least in class action litigation, from offering a settlement on the merits of the litigation conditioned upon a waiver of all or most of the fees otherwise due for the often-hundreds-of-hours expended

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36. 52 Stat. 1069, as amended, 29 U.S.C. § 216(b).

37. 86 Stat. 955, 963, as amended, 15 U.S.C. §§ 1918(a), 1989(a)(2).

38. S. 2104, 101st Cong., 2d Sess. § 9(4) (1990).

by plaintiffs' counsel to resolve contested litigation favorably through a settlement.

The need for this statutory provision stems from the Supreme Court's decision in Evans v. Jeff D.[39] approving -- as not inconsistent with statutory fee shifting -- the practice of defense counsel of conditioning a proposed settlement, favorable to civil rights plaintiffs on the merits, upon a waiver of the statutory fees that otherwise would be due to plaintiffs' counsel. Given the general ethical duty of counsel to abide by the directions of their clients about accepting settlements,[40] the result of this practice is a coerced or compelled waiver of fees.

In approving this practice and the resulting compelled waiver of fees,[41] the Court in its majority opinion nowhere addressed the congressional policy underlying the purposes of and the need for statutory fee shifting. The majority instead, looking to the language of private attorney general fee-shifting statutes,

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39. 475 U.S. 717 (1986).

40. As summarized by the majority in Evans, counsel "must abide by the client's decision whether or not to accept the offer, see [ABA] Model Code of Professional Responsibility EC 7-7 to EC 7-9; [ABA] Model Rules of Professional Conduct 1.2(a)." 475 U.S. at 728 n.14 (brackets added).

41. At the outset of the majority opinion in Evans, the Court rejected the argument that defendants' offer of settlement conditioned upon a waiver of fees imposed an unethical dilemma upon plaintiffs' attorney. This was because plaintiffs' unpaid private attorney "had no ethical obligation to seek a statutory fee award. His ethical duty was to serve his clients loyally and competently.... [Accordingly, the attorney's] decision to recommend acceptance [of the favorable offer on the merits conditioned upon a waiver of all fees] was consistent with the highest standards of our profession." 475 U.S. at 728 (emphasis by the court) (footnote omitted) (ellipsis and brackets added).

observed that Congress did not bestow fee entitlement upon counsel, but rather "Congress bestowed [fee entitlement] on the 'prevailing party' (generally plaintiffs)."[42] The majority also noted a legislative history reference to fees "as 'an integral part of the remedies necessary to obtain' compliance with civil rights laws,"[43] from which the majority inferred that Congress thus had merely added fees to the supposed "arsenal of remedies" available to plaintiffs, with any one potential remedy being able to be balanced and traded off against any other potential remedy.[44] In sum, Congress "neither bestowed fee awards upon attorneys nor rendered them nonwaivable" by plaintiffs.[45]

Although the congressional policy underlying the need for statutory fee shifting in civil rights cases was altogether disregarded by the majority in Evans, that policy and it's evisceration by the majority formed the centerpiece of the

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42. Evans, 475 U.S. at 730 (emphasis by the Court) (footnote omitted), quoting from 42 U.S.C. § 1988.

43. Evans, 475 U.S. at 731, quoting from S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976).

44. Evans, 475 U.S. at 731-32. These views expressed by the majority in Evans represented the first time that any court in any civil rights case had deemed statutory attorneys fees as having been vested by Congress not in counsel but in their usually impecunious and non-fee-paying clients. Prior to Evans, it had been settled law that "the fees allowed are to reimburse and compensate for legal services rendered and will not go to the litigants, named or class." Miller v. Amusement Enterprises, Inc., 426 F.2d 534, 539 (5th Cir. 1970).

45. Evans, 475 U.S. at 731. The majority also asserted that their statutory interpretation was augmented by judicial policy favoring settlements, a goal which might be less than optimally pursued by defense counsel unable to coerce a waiver of fees. 475 U.S. at 732.

dissenting opinion. Written by Justice Brennan, the dissenters initially observed that federal statutes must be interpreted consistently with Congress' broad purposes for enactment,[46] and, after setting forth the congressional purposes for fee shifting in civil rights cases,[47] they concluded that "Congress' primary purpose was to enable 'private attorneys general' to protect the public interest by creating economic incentives for lawyers to represent them."[48] Given this overriding purpose, the dissenters in Evans construed congressional policy as having barred coerced fee waivers because it was "obvious that allowing defendants in civil rights cases to condition settlement of the merits on a waiver of statutory attorney's fees will diminish lawyers' expectation of receiving fees and decrease the willingness of lawyers to accept civil rights cases."[49] No one -- much less lawyers potentially willing to take civil rights cases, and of course the victims of unlawful employment discrimination among other civil rights violations -- needs "a sociological study to see that permitting fee waivers will make it more difficult for civil rights plaintiffs to obtain legal assistance. It requires only

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46. Evans, 475 U.S. at 744.

47. Evans, 475 at 745-52. These overriding purposes are only briefly summarized at the outset of this Statement, supra at 2-3.

48. Evans, 475 U.S. at 751-52.

49. Evans, 475 U.S. at 754.

common sense."[50]

In the wake of Evans -- and in large part because of the breadth of the majority's ruling in its lack of deference to Congress and to the realities of civil rights practice by counsel -- there now are no available routes whatsoever through litigation for unpaid plaintiffs lawyers to get any court-awarded fees at all

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50. Evans, 475 U.S. at 755. The dissenters also refuted the majority's preference of sacrificing congressional policy favoring vigorous civil rights enforcement for a few coerced-fee-waiver settlements. As the dissenters correctly observed, the encouragement of settlement is a "judicially created policy," and the "congressional policy underlying the Fees Act is ... to create incentives for lawyers to devote time to civil rights cases by making it economically feasible for them to do so." 475 U.S. at 760 (emphasis by the Court) (ellipsis added). Accordingly, "even if prohibiting fee waivers does discourage some settlements, a judicial policy favoring settlement cannot possibly take precedence over this express congressional policy." 475 U.S. at 761 (emphasis by the Court). More to the point, any settlements caused by fee waivers would ultimately negate congressional policy:

> The Fees Act was designed to help civil rights plaintiffs in a particular way -- by ensuring that there will be lawyers willing to represent them. The fact that fee waivers may produce some settlement offers that are beneficial to a few individual plaintiffs is hardly "consistent with the purposes of the Fees Act," if permitting fee waivers fundamentally undermines what Congress sought to achieve. Each individual plaintiff who waives his right to statutory fees in order to obtain additional relief for himself makes it that much more difficult for the next victim of a civil rights violation to find a lawyer willing or able to bring his case. As obtaining legal assistance becomes more difficult, the "benefit" the Court so magnanimously preserves for civil rights plaintiffs becomes available to fewer and fewer individuals, exactly the opposite result from that intended by Congress.

475 U.S. at 761-62 (citation omitted) (emphasis by the Court).

when confronted with a favorable offer on the merits conditioned upon a waiver of fees. All litigation options have been tried, and for civil rights counsel all have failed:

> -- Federal courts have no power in class actions under Fed. R. Civ. P. 23(e) to modify or alter the terms of a proposed class action settlement.[51]
>
> -- Post-judgment motions by plaintiffs and/or their counsel, following an agreed-upon waiver of fees, cannot succeed.[52]
>
> -- Settlements silent on fee entitlement have been construed as the end of all merits and fees claims, with the result that post-settlement petitions for fees cannot and do not succeed.[53]

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51. This procedural power was at issue in and rejected by the narrow majority in Evans v. Jeff D., 475 U.S. 717, 727-28 (1986); see also, Huertas v. East River Housing Corp., 813 F.2d 580 (2d Cir. 1987).

52. Phillips v. Allegheny County, 869 F.2d 234 (3d Cir. 1989); National Senior Citizens Law Center v. Social Security Administration, 849 F.2d 401 (9th Cir. 1988); Moore v. National Association of Securities Dealers, 762 F.2d 1093 (D.C. Cir. 1985); Lazar v. Pierce, 757 F.2d 435 (1st Cir. 1985).

53. A majority of the courts have construed settlement agreements silent about fees as waiving fees, see Wakefield v. Mathews, 852 F.2d 482 (9th Cir. 1988); Young v. Powell, 729 F.2d 563 (8th Cir. 1984); Brown v. General Motors Corp., 722 F.2d 1009 (2d Cir. 1983); cf. Toth v. United Automobile Workers of America, 743 F.2d 398 (6th Cir. 1984) (full and complete settlement); Goodwin v. Schramm, 731 F.2d 153 (3d Cir. 1984) (costs); Jennings v. Metropolitan Government of Nashville, 715 F.2d 1111 (6th Cir. 1983) (record established an intentional waiver of fees).

> -- And, plaintiffs counsel altogether denied all fees lack Article III "standing" to intervene in their clients' pending litigation to assert their interest in the attorneys fees,[54] much less to file a new lawsuit for fees;[55] and even discharged counsel have no "standing" to intervene or to sue.[56]

Apparently anticipating that there were (or would be) no litigation alternatives for plaintiffs' counsel, the dissenters in Evans expressed their hope "that Congress will repair this Court's mistake."[57] Given that there are no other alternative solutions to this extraordinary disincentive to lawyers filing civil rights cases in general and to filing employment discrimination cases in

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Although this tactic may appear to hold out some hope for plaintiffs' attorneys in the Third Circuit, see Ashley v. Atlantic Richfield Co., 794 F.2d 128 (3d Cir. 1986); El Club Del Barrio v. United Community Corporations, 735 F.2d 98 (3d Cir. 1984), this avenue too seems to have been closed by the Supreme Court's decision in Evans. The majority in Evans, it must be recalled, not only recognized that statutory fee eligibility was bestowed on the parties, 475 U.S. at 730, but also characterized fees as merely part of the remedies available to party plaintiffs, 475 U.S. at 731. Accordingly, any settlement which purports to be complete as to a party plaintiff, even though silent as to fees, would appear to constitute a waiver of fees.

54. Willard v. Los Angeles, 803 F.2d 526 (9th Cir. 1986); Freeman v. B & B Associates, 790 F.2d 145 (D.C. Cir. 1986).

55. Mitchell v. Los Angeles, 741 F.2d 281 (9th Cir. 1985).

56. Panola Land Buying Association v. Clark, 844 F.2d 1506 (11th Cir. 1988).

57. Evans, 475 U.S. at 765

particular,[58] Congress should now accept that invitation and repair the Court's mistake.

Although Section 9(4) of this Act would not entirely right the wrong in Evans -- given that it would amend only one of many important civil rights statutes, and given that even then it would apply only to class action settlements all of which must receive court approval under Rule 23(e) of the Fed. R. Civ. P. -- this

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58. Some lawyers have sought protections against fee waivers by revising and tightening their retainer agreements with clients. These supposed protections are, however, often illusory.

The unworkability of contingency fee agreements was foreshadowed by Justice Brennan's dissent in Evans, where he pointed out that "protection through contingency fee arrangements is unavailable in the very large proportion of civil rights cases which, like this case, seek only injunctive relief," that immunity doctrines preclude "damages suits against governmental bodies, the most frequent civil rights defendants," and that the few damages suits that are maintainable ordinarily "concern amounts that are too small to provide real compensation through a contingency fee arrangement." 475 U.S. at 757 n.10.

Also illusory are retainer provisions which assign the client's interest in fees to counsel, or which condition counsel's legal representation upon the client's agreement not to waive fees. The illusory nature of these supposed protections is quickly revealed by the fact that, as a matter of ethics, counsel still must abide by the client's decision whether or not to accept a settlement offer, with or without a waiver of fees. Evans, 475 U.S. at 728 n.14 (majority opinion); 475 at 755-56 & n.8 (dissent).

Of course, clients who accept settlements while waiving fees in violation of their contractual retainer agreements could thereafter be sued on contract claims. But, even apart from the fact that most civil rights plaintiffs are judgment proof, few civil rights lawyers could or would turn around and sue their former clients.

For these reasons among others, Justice Brennan pointed out that no one involved in Evans "seriously suggested that civil rights attorneys can protect themselves through private arrangements. After all, Congress enacted [fee-shifting statutes] because ... it found such arrangements wholly inadequate." 475 U.S. at 757 n.10 (brackets and ellipsis added).

provision nonetheless is certainly a step in the right direction. It deserves immediate enactment.

4. Fees for Defending a Judgment

Section 9(4) of the Act also adds another new paragraph to § 706(k), as follows:

> (3) In any action or proceeding in which any judgment or order granting relief under this title is challenged, the court, in its discretion, may allow the prevailing party in the original action (other than the Commission or the United States) to recover from the party against whom relief was granted in the original action a reasonable attorney's fee (including expert fees and other litigation expenses) and costs reasonably incurred in defending (as a party, intervenor or otherwise) such judgment or order.[59]

This provision is designed to authorize fees to the party who prevails in an original action, and who thereafter becomes embroiled in further litigation necessary to defend the previously-won judgment or order granting relief.

Prior to last June, 1989, the federal courts routinely awarded fees to prevailing parties who became involved in further

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59. S. 2104, 101st Cong., 2d Sess. § 9(4) (1990).

litigation to protect the relief already won.[60] Like many other established legal doctrines that were unraveled last June, this too was changed.

In Independent Federation of Flight Attendants v. Zipes, [hereafter "Flight Attendants"],[61] the Supreme Court changed the rules and held that plaintiffs, who had over a period of years successfully defended their Title VII judgment against an intervening union,[62] were not entitled to fees under the standard otherwise governing fees for a prevailing plaintiff, but could recover fees "only where the intervenors' action was frivolous, unreasonable, or without foundation."[63] Writing for the majority, Justice Scalia went even further, stating in dictum that original plaintiffs who sought to protect their judgments against collateral attacks as in Martin v. Wilks[64] had in those cases no basis for fee recovery whatsoever.[65]

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60. See, e.g., Charles v. Daley, 846 F.2d 1057 (7th Cir. 1988), awarding fees to prevailing plaintiffs who successfully defended appeals brought by intervening defendants even to the Supreme Court, Diamond v. Charles, 476 U.S. 54 (1986).

61. 491 U.S. ___, 109 S.Ct. 2732, 105 L.Ed.2d 639 (1989), rev'g sub nom. Zipes v. Trans World Airlines, Inc., 846 F.2d 434 (7th Cir. 1988).

62. The plaintiffs successfully defended their judgment not just in the lower federal courts but also in the Supreme Court. Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982).

63. Flight Attendants, 105 L.Ed.2d at 648.

64. 490 U.S. ___, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989).

65. Flight Attendants, 105 L.Ed.2d at 649, 651. Since Flight Attendants was litigated through intervention and involved no collateral attack, and since Martin v. Wilks involved no issue of

Overall, there were three opinions in Flight Attendants, each addressing who should bear plaintiffs' fees: the majority opinion by Justice Scalia; a dissenting opinion by Justice Marshall; and a separate concurring opinion by Justice Blackmun. Each needs to be reviewed briefly to understand fully the problem at hand, and the need for a congressional fix.

In the majority opinion, Justice Scalia -- essentially adopting the dissenting opinion by Judge Daniel Manion in the court below as the new law of the land -- held that successful plaintiffs ordinarily should bear their own fees, rather than having those fees shifted to the intervening defendants.[66] Justice Scalia posited two rationales for this result. First, "in contrast to losing Title VII defendants who are held presumptively liable for attorney's fees, losing intervenors like [the union here] have not been found to have violated anyone's civil rights."[67] Second, the intervenors ordinarily are only "protecting legal rights" -- here "contract-based rights" -- "which are entitled to no less respect than the rights asserted by plaintiffs in the subject suit."[68]

Justice Marshall, whose dissenting opinion would have shifted

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attorneys fees, Justice Marshall in his dissent in Flight Attendants characterized Justice Scalia's statements as "specious" and as "conclusory dicta of the worst kind." 105 L.Ed.2d at 659 n.6.

66. Flight Attendants, 105 L.Ed.2d at 646-52. Compare Zipes v. Trans World Airlines, Inc., 846 F.2d 434, 443-445 (7th Cir. 1988) (Manion, J., dissenting).

67. Flight Attendants, 105 L.Ed.2d at 649 (brackets added).

68. Flight Attendants, 105 L.Ed.2d at 651.

plaintiffs' fees to the union intervenor,[69] rebutted the foregoing rationales. First, given the routine assessment of fees against defendants who have never been adjudged to have violated anyone's civil rights, such as in most cases which settle,[70] the "authority to award fees in civil rights cases does not require a finding that any party caused a civil rights injury."[71] Second, the issue here "is not whether the claims [of intervenors] are entitled to equal respect,"[72] but whether the victims of discrimination will be able to continue to "serve as 'the chosen instrument of Congress to vindicate "a policy that Congress considered of the highest priority."'"[73] Ultimately, since "the only party mentioned in § 706(k) is 'the prevailing party'" without limitation as to the

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69. Flight Attendants, 105 L.Ed.2d at 654-60.

70. Maher v. Gagne, 448 U.S. 122 (1980) (holding that, despite defendants' desclaimer of wrongdoing and liability, plaintiffs who prevail through settlement are entitled to fees).

The courts have also widely held that plaintiffs who serve as catalysts, merely encouraging defendants to undertake plaintiffs' sought-after objectives, are prevailing parties entitled to fees even though their cases became moot with judgments entered against them. See cases collected in Larson, Federal Court Awards of Attorney's Fees, 68-74 (1981).

71. Flight Attendants, 105 L.Ed.2d at 658 (emphasis by Justice Marshall). In contrast, some fee-shifting statutes outside the field of civil rights expressly condition fee entitlement upon a violation of the law. See, e.g., Clayton Act, 15 U.S.C. § 15.

72. Flight Attendants, 105 L.Ed.2d at 660 (brackets added).

73. Flight Attendants, 105 L.Ed.2d at 656, quoting from Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 418 (1978) (citation omitted).

parties that may be assessed fees,[74] and since "intervenors force victims of discrimination to spend additional scarce resources to obtain relief,"[75] Justice Marshall concluded that prevailing plaintiffs were entitled to fees against intervenors.[76]

Justice Blackmun, through a separate opinion concurring in the judgment,[77] disagreed with the dissent's view that plaintiff's fees should be shifted to the intervenor, and also disagreed with the majority's result of making the prevailing plaintiff bear the fees because that "result is presumptively to place the additional cost

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74. Flight Attendants, 105 L.Ed.2d at 655, quoting from § 706(k) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k). In comparison, when Congress has wanted to limit the parties that may be assessed fees, it has done so. See e.g., Fair Labor Standards Act, 29 U.S.C. § 216(b) (limiting fee liability only to "defendants" who are "employers").

75. Flight Attendants, 105 L.Ed.2d at 657. "The costs to plaintiffs are no less real when the person causing the financial expenditures is an intervenor than when he is a defendant." Id.

76. Flight Attendants, 105 L.Ed.2d at 660. Justice Marshall also addressed the consequence of not allowing fees for the prevailing plaintiffs, id.:

> Finally, the majority ignores the likely consequence of today's decision. In the future, defendants can rely on intervenors to raise many of their defenses, thereby minimizing the fee exposure of defendants and forcing prevailing plaintiffs to litigate many, if not most, of their claims against parties from whom they have no chance of recovering fees. Without the hope of obtaining compensation for the expenditures caused by intervenors, many victims of discrimination will be forced to forgo remedial litigation for lack of financial resources. As a result, injuries will go unredressed and the national policy against discrimination will go unredeemed.

77. Flight Attendants, 105 L.Ed.2d at 652-54.

of litigating third-party rights on the prevailing Title VII plaintiff, whom Congress has assumed lacks the resources to bear them."[78] In Justice Blackmun's view, all such additional costs should be shifted to the original defendant:

> Addressing and adjusting the rights of a third party are parts of the social cost of remedying a Title VII violation. That cost, as well as the cost to the plaintiff of vindicating his or her own rights, would not have existed but for the conduct of the Title VII defendant. I see nothing in the language of the statute or in our precedents to foreclose a prevailing plaintiff from turning to the Title VII defendant for reimbursement of all the costs of obtaining a remedy, including the costs of assuring that third-party interests are dealt with fairly.[79]

Section 9(4) of this legislation, as is apparent, essentially adopts Justice Blackmun's views in Flight Attendants by shifting the fees of a plaintiff who prevailed in the original litigation to the original defendant. Regardless of whether such fees should be shifted to the defendant, to an intervenor who challenges the relief granted, or to a new party mounting a collateral attack, the

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78. Flight Attendants, 105 L.Ed.2d at 652. The majority's result, in fact, "compromises Congress' interest in furthering private enforcement of Title VII." Id. at 654.

79. Flight Attendants, 105 L.Ed.2d at 652-53.

fact of the matter is that the fees and expenses of the original-action prevailing plaintiff must be shifted in order to restore the underlying congressional purpose of attracting competent counsel to represent the victims of employment discrimination.

The deterrent effect upon counsel of not being able to recover fees when defendant intervenors multiply the already-complex proceedings in employment discrimination litigation not only is obvious but in fact was one of the reasons that the lower court in Flight Attendants -- only to be reversed by the Supreme Court -- allowed fees to counsel for the prevailing plaintiffs:

> Absent the possibility of recovering their attorneys' fees from [intervenor-defendant] IFFA, the prevailing plaintiffs would likely have been hard pressed to come up with sufficient funds to attract counsel willing to defend their settlement before the district court, this court, and, finally, the Supreme Court.[80]

Plaintiffs' counsel in Flight Attendants of course not only had to defend the settlement on the merits before the District Court, the Court of Appeals, and the Supreme Court,[81] but also had to litigate thereafter through the very same judicial gauntlet for

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80. Zipes v. Trans World Airlines, Inc., 846 F.2d 434, 440 n. 10 (7th Cir. 1988), rev'd sub nom., Independent Federation of Flight Attendants v. Zipes, 491 U.S. ___, 109 U.S. 2732, 105 L.Ed.2d 639 (1989).

81. Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982).

entitlement to their statutory fees, ultimately denied to them by the Supreme Court.[82]

The experience of plaintiffs' attorneys in Flight Attendants, of being forced into extensive post-judgment litigation merely to protect the judgment, unfortunately, is not an isolated experience.[83] And the negative effect of the majority ruling in Flight Attendants is already being felt.[84]

The new paragraph (3) which would be added to § 706(k) by Section 9(4) of this legislation may not be the perfect answer to the majority opinion in Flight Attendants, but it is an appropriate one, and it deserves enactment.

5. Equalizing Fees for Delay in Payment

The final necessary change affecting awards of attorneys fees is made through § 10(2) of the Act, which amends § 717(d) of the

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82. Independent Federation of Flight Attendant v. Zipes, 491 U.S. ___, 109 S.Ct. 2732, 105 L.Ed.2d 639 (1989).

The amount of fees awarded to counsel for the prevailing plaintiffs in successfully defending the settlement -- the amount ultimately denied to them by the Supreme Court -- was $180,915.84. Id., 105 L.Ed.2d at 646. The amount of fees (based again on the hundreds of billable hours expended by counsel) lost by plaintiffs' counsel in the litigation involving their entitlement to statutory fees is of course unknown given the Supreme Court's denial of all post-settlement fees.

83. See, e.g., Local 93, Int'l Ass'n of Firefighters v. Cleveland, 478 U.S. 501, 506-15 (1986) (involving five additional years of ultimately successful litigation in defense of a Title VII consent judgment remedying past discrimination).

84. See, e.g., Davis v. City and County of San Francisco, 890 F.2d 1438, 1452 (9th Cir. 1989) (upholding a favorable consent judgment challenged by a union intervenor, but denying fees to the prevailing plaintiffs under Flight Attendants).

Civil Rights Act of 1964 by expressly stating that "the same interest to compensate for delay in payment shall be available as in cases involving non-public parties."[85] The purpose of this provision is to allow interest, or delay-in-payment compensation, not only on back-pay awards for plaintiffs but also on awards of attorneys fees against the federal government the same as is and always has been available against private-sector employers.

Adhering to Congress' purpose in enacting fee-shifting statutes -- to encourage the vindication of civil rights -- even the Supreme Court has had to agree that, in order for statutory fees to be reasonable, fee awards should include delay-in-payment compensation because of the fact that counsel for prevailing parties are paid not according to market-based 30-day billing but instead only at the end of often-lengthy and hard-fought litigation.[86] For example, in approving delay-in-payment compensation against a losing state defendant despite the state's Eleventh Amendment objections, the Supreme Court last year observed:

> Clearly, compensation received several years after the services were rendered -- as it frequently is in complex civil rights litigation -- is not equivalent to the same dollar amount received reasonably promptly as

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85. S. 2104, 101st Cong., 2d Sess. § 10(2) (1990).

86. E.g., Missouri v. Jenkins, 491 U.S. ___, 109 S.Ct. 2453, 105 L.Ed.2d 229 (1989); Pennsylvania v. Delaware Valley Citizens' Council, 483 U.S. 711 (1987).

> the legal services are performed, as would normally be the case with private billings. We agree, therefore, that an appropriate adjustment for delay in payment -- whether by the application of current rather than historic hourly rates or otherwise -- is within the contemplation of the statute.[87]

Two years earlier, in rejecting the suggestion "that adjustments for delay are inconsistent with the typical fee-shifting statute," the Supreme Court echoed the sentiments expressed above.[88] And, a year before that, in Library of Congress v. Shaw, the Supreme Court explained that,

> increasing an attorney's fee award for delay is appropriate because the hourly rates used for the lodestar represent the prevailing rate for clients who typically pay their legal

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87. Missouri v. Jenkins, 105 L.Ed.2d at 240 (footnote omitted).

88. Pennsylvania v. Delaware Valley Citizens' Council, 483 U.S. at 716. The Court explained, with regard to "the matter of delay," as follows:

> When plaintiffs entitlement to attorney's fees depends on success, their lawyers are not paid until a favorable decision finally eventuates, which may be years later.... Meanwhile, their expenses of doing business continue and must be met. In setting fees for prevailing counsel, the courts have regularly recognized the delay factor, either by basing the awards on current rates or by adjusting the fee based on historical rates to reflect its present value.

Id. (ellipsis added) (citations omitted).

> bills promptly, whereas court-awarded fees are normally received long after the legal services are rendered. An increase for delay is designed to compensate the attorney for the money he could have earned had he been paid earlier and invested the funds.[89]

Despite the Supreme Court's foregoing recognition in 1986 of the appropriateness of delay-in-payment compensation in general, the same majority of the Court in Library of Congress v. Shaw nevertheless held that delay-in-payment compensation against the federal government had to be treated differently because of the federal government's sovereign immunity. According to the majority: although Congress in 1972 did waive the federal government's sovereign immunity from monetary awards of attorneys fees,[90] the delay-in-payment part of an award of fees was the equivalent of an award of interest, and Congress had not expressly waived the federal government's sovereign immunity from awards of interest.[91]

Quite frankly, "something is uniquely amiss in a society where the government, the authorative oracle of community values,

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89. 478 U.S. 310, 313 (1986).

90. See § 706(k) of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, Pub. L. 92-261 (March 24, 1972), 86 Stat 103, 42 U.S.C. § 2000e-5(k): authorizing attorneys fees and providing that "the United States shall be liable for costs the same as a private person."

91. Library of Congress, 478 U.S. at 318-23.

involves itself in ... discrimination."[92] It is equally if not more offensive that the federal government, when found guilty of unlawful employment discrimination, cannot be subjected to the same monetary liability as are private-sector employers.

All that Section 10(2) of this legislation seeks to accomplish is to place the federal government's liability on the same plane with that of all other employers. This is fair; it is just; it is absolutely necessary.

Conclusion

The legislation before us, S. 2104, makes a number of commendable changes in our federal laws barring employment discrimination. Not only are these substantive changes commendable, they are absolutely necessary.

These substantive changes, however, will be no more than hollow pronouncements meaning little or nothing to the victims of employment discrimination unless the impecunious victims can find lawyers to vindicate their rights.

Nearly fifteen years ago, in an initially successful effort to nullify an adverse Supreme Court decision adversely affecting the recovery of attorneys fees,[93] Congress observed in the course

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92. Adickes v. S. H. Kress Co., 398 U.S. 144, 190-91 (1970) (Brennan, J., concurring in part and dissenting in part) (ellipsis added).

93. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975).

of enacting the Civil Rights Attorney's Fees Awards Act of 1976[94] that:

> If the cost of private enforcement actions becomes too great, there will be no private enforcement. If our civil rights laws are not to mere hollow pronouncements which the average [person] cannot enforce, we must maintain the traditionally effective remedy of fee shifting.[95]

Today, there are very few lawyers willing to represent the impecunious victims of employment discrimination. Following the enactment of the attorneys fees provisions in this legislation, we can hope that more victims will be able to find competent counsel to vindicate their rights.

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94. 90 Stat. 2641, amending 42 U.S.C. § 1988.

95. S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976) (emphasis and brackets added).

The CHAIRMAN. Just very briefly, the number of employment discrimination cases filed, as I understand, dropped from 1,174 in 1976 to 48 in 1987. Why do you believe that is so? Is that as a result of less problems in terms of discrimination, or does it have something to do with attorneys' fees?

Mr. LARSON. Certainly in my experience, having litigated for 20 years, and much in the area of employment discrimination, it is not because of any lesser amount of employment discrimination whatsoever. We get the same complaints coming to my office today as I was getting 20 years ago.

There are two factors, really. One is the set of court decisions on attorneys' fees. The other is the economic practice of law, where you've got to wait until not just the end of the case, you've got to win it, but the end of the fees litigation. That's something that this Congress really cannot address here, but with regard to the restrictive court opinions, definitely they should be addressed.

The CHAIRMAN. The EEOC reports over 100,000 cases, so they are reported——

Mr. LARSON. The charges are still being filed, absolutely.

The CHAIRMAN. And are any of these people getting rich? That's a constant charge.

Mr. LARSON. Most of the civil rights lawyers that I know, Senator Kennedy, would love to earn half of what Mr. Nager makes.

Mr. NAGER. Senator Kennedy, as long as my salary——

The CHAIRMAN. I'll let you respond on that—briefly, briefly.

Mr. LARSON. As a matter of fact, Senator, my goal when I graduated and starting practicing civil rights law 20 years ago was that at sometime or another, as I became more and more experienced, to make as much as a graduating student from law school is making in the first year of practice in mid-town New York. And I have always fallen farther behind.

Mr. NAGER. Senator, I'm not on a recruiting committee, but if Mr. Larson wanted to send us his resume, I am sure with his experience we'd be happy to consider it.

Let me make one point about the statistics. You asked a question on the number of class actions falling from 1,174, I think you said, to 48. But by the same token, if we looked at the EEOC statistics and the Judicial Conference's statistics, we would see that the number of employment discrimination cases being filed in court have gone up, and I daresay that if we looked at those cases, we would see that almost every one of those plaintiffs is being represented by an attorney. So to suggest that somehow there is a lack of lawyers in the plaintiffs' bar willing to represent civil rights plaintiffs is ignoring the very statistics, the total number of statistics, that are out there and that Mr. Larson is choosing a subset of those to try to make a point.

I can think of an alternative explanation for why the number of class actions have fallen, which has to do with the fact that the U.S. Supreme Court rendered a different decision which managed to escape this bill, since this bill tries to address every case decided since title VII was enacted.

The U.S. Supreme Court said that in a title VII class action, plaintiffs have to have common questions of law or fact and that many of the class actions that have been filed involve people who

had disparate interests, and the class representatives were not proper.

The CHAIRMAN. Well, obviously, those of us who support it view it differently.

Let me ask Mr. Barr as to the general attacks on section 6 as merely a contrivance intended to present procedural obstacles to discrimination claims advanced by white males, how do you respond to that?

Mr. BARR. I don't understand the point, Senator. One of the things that that apparently assumes is that all discrimination will always be against blacks and women and Hispanics, and there will never be a situation where white males are discriminated against. I hope that isn't so. I hope that is not the type of society that we are all looking forward to.

I can think of days—hopefully, there will come times when suits are brought against women and black people for discriminating against white males.

The CHAIRMAN. Senator Adams.

Senator ADAMS. I have just one question, which goes to Mr. Nager on the notice question, and it is sort of hypothetical.

Let's say in 1981 when this case was decided, we've got a 10 year-old, and he hasn't quite made up his mind what he wants to do yet. He finally decides later on in 1990, when he is now 19, that he would like to be a firefighter. But he didn't hear about the 1981 case. Can he collaterally attack that consent decree? Has his claim been affected by such an attack?

Mr. NAGER. I think the answer is he can file a lawsuit, yes. He would not have had notice of it. I can't remember what age you said—I assume he could read at that point, but I doubt he would have been personally served with notice.

Senator ADAMS. This is just a practical matter of what happens in the real world out there, and if we don't have some finality on this, it would seem to me that the result would be that someone would say these are the rules that were established in 1981, and you fit or you don't fit, or you can apply. But your answer to me seems to indicate that he could collaterally attack that decree. And we heard testimony from the rest of the panel, and it has certainly been my experience as a trial lawyer, that you have to have—and I know the WPPS case very well—if we don't get some finality in that case, where you just finally say to all the people who are involved, defendants and plaintiffs, this is the result, and here's what you've got, why, we make a shambles of the court system.

Mr. NAGER. I disagree, Senator. If he goes to a lawyer and says, "I think I am being discriminated against because of my race," his lawyer should ask him "Why?" And he will say, "For the following reasons. . . ." And if that decree has been upheld, his lawyer, if he is acting properly, should say, "Well, look, that decree has been upheld by the following court, it has been upheld on three occasions; unless you can give me some facts to show why your case is different than those others, I don't think we can file it for you."

But in fact, the circumstances may well have changed in the 10 years the decree was in place. There are certain substantive constraints on such decrees. They must be existing to correct manifest imbalances in the work force; they must be temporary in time and

place; and they must not unnecessarily trample the rights of people who are innocent and not parties to the discrimination. An individual is entitled to ask those questions. And we should want him to, because we shouldn't want unlawful decrees operating, depriving people of their rights.

The CHAIRMAN. We've got to recess, Senator Adams, if you want to make a brief comment.

Senator ADAMS. Yes. My one brief comment on that is from the history of this particular case which we have heard about, after two trials and a fairness hearing and a decision in 1981, to come in in 1988 and say that the procedures haven't worked is the reason why we've got to have a bill.

The CHAIRMAN. Well, beyond that, as I understand, you can alter various decrees, filing under rule 60(b). In any event, we don't reach any of those kinds of questions.

[Additional statements and material submitted for the record follow:]

IMPACT OF THE SUPREME COURT DECISION IN MARTIN v. WILKS

I. SUMMARY

In a 5-4 ruling on June 12, 1989 in Martin v. Wilks, the Supreme Court held that a person could not be precluded from filing a separate lawsuit challenging a consent decree unless that person was made a party to the consent decree action - even if that person had had an opportunity to be heard by the court prior to the entry of the decree.[1]

Everyone agrees that people whose rights may be affected by a decree should have a fair opportunity to have their "day in court" prior to the entry of the decree.[2] The issue raised by the Supreme Court's decision, instead, is whether there should be reasonable and orderly procedures to protect those rights prior to the entry of a decree or whether people should be allowed to relitigate the same claims over and over again without end.

The Martin decision has already resulted in numerous long-settled cases being re-opened to the prospect of perpetual litigation. The decision threatens to lead to renewed litigation over any and every consent decree and litigated order[3] where

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[1] 490 U.S. ____, 104 L.Ed.2d 835, 109 S.Ct. 2180 (1989)

[2] Indeed, that is precisely what happened in the Martin case. See discussion of facts below.

[3] The decision applies equally to both consent decrees and to litigated judgments and orders where no consent decrees are involved.

persons claim they were "adversely affected" no matter how much time has passed since the original lawsuit and no matter how many chances the "adversely affected" persons had to participate in the original lawsuit.[4] In addition, by holding out the likelihood of interminable litigation and possible multiple liability even after settlement, the decision undermines the Congressional preference for settlement of employment discrimination lawsuits and destroys the vital concept of finality of litigation. Instead, the Martin decision has led and will continue to lead to an unnecessary waste of precious judicial and other resources on issues resolved years earlier. Many employers are strongly opposed to the rule announced in this decision because of its disruptive impact.

II. FACTS

The Martin litigation has already lasted over sixteen years, with no end in sight. Martin v. City of Birmingham was filed by the Lawyers' Committee for Civil Rights Under Law on January 7, 1974, on behalf of black employees of, and applicants for employment with, the City of Birmingham and Jefferson County,

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[4] The four dissenters noted that "(t)here is nothing unusual about the fact that litigation between adverse parties may, as a practical matter, seriously impair the interests of third persons who elect to sit on the sidelines. Indeed, in complex litigation this Court has squarely held that a sideline-sitter may be bound as firmly as an actual party if he had adequate notice and a fair opportunity to intervene and if the judicial interest in finality is sufficiently strong." 104 L.Ed.2d 835 at 863. (Justice Stevens dissenting, joined by Justices Brennan, Marshall and Blackmun)

Alabama.[5] The Martin action alleged race discrimination in hiring and promotions. In May of 1975, the United States Department of Justice filed a related case - United States v. Jefferson County - alleging that blacks and women were victims of race and sex discrimination by the City of Birmingham, Jefferson County and a number of smaller jurisdictions. Martin, United States v. Jefferson County, among other cases, were consolidated for discovery and trial. After two trials and two appeals, a finding

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[5] A related case claiming race discrimination by the City was also filed in January 1974 by the Ensley Branch of the NAACP in Birmingham - Ensley Branch NAACP v. Seibels. At the time these cases were filed, there were virtually no black persons in any of the jobs in the "classified" civil service of the City of Birmingham, which includes virtually all jobs other than laborer jobs, such as police officers, firefighters, truck drivers and secretaries. As late as 1958, the job announcements for positions in the classified service expressly said that "[a]pplicants must be white." Although, as a result of litigation, the City stopped using such job announcements, the discrimination continued. In the Fire Department, for example,

* Blacks were actively discouraged from applying for firefighter positions.

* The City did not hire a black firefighter until 1968.

* The City did not hire another black firefighter until 1974, although during that six-year period it hired 170 white firefighters.

* Entry-level examinations discriminated against black applicants.

* By 1976, only nine (1.4%) of the City's 630 firefighters were black.

* By 1981, only 9.3% of the firefighters were black, and none of the 140 lieutenants, captains and battalion chiefs was black.

The same pattern existed throughout the City workforce.

of discrimination in hiring[6] and the introduction of massive evidence of discrimination in promotions in the Fire Department[7] and in other City departments, the Martin plaintiffs and the Department of Justice entered into consent decrees with the City of Birmingham and their civil service agent, the Jefferson County Personnel Board, in 1981. These consent decrees included affirmative action goals for the hiring and promotion of blacks and women in City jobs.

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[6] Ensley Branch, NAACP v. Seibels, 13 Empl. Prac. Dec. (CCH) ¶11,504 (N.D. Ala. Jan. 10, 1977), aff'd in part and rev'd in part, 616 F.2d 812 (5th Cir.), cert. denied, 449 U.S. 1061 (1980). The Ensley Branch suit was filed in 1974, and was consolidated with Martin and United States v. Jefferson County for trial.

[7] The evidence of promotional discrimination adduced at the 1979 trial was egregious. For example,

* To be eligible to take promotional examinations, employees had to receive "passing" promotional potential evaluations that were subjectively graded by supervisors (all of whom were white), and in the Fire Department, black employees received "failing" scores four times more often than did white employees.

* There were also time-in-grade requirements to be eligible to take promotional examinations, but because blacks had been excluded from entry-level positions, in 1979 only one black firefighter, compared to 361 white firefighters, met those requirements.

* One "seniority point" was added to the examination scores of applicants for promotion for each year of their employment in any position in the classified service - not necessarily in the same chain for promotion - which discriminated against black employees because they had been excluded from the classified service.

As a result of these and other practices, no black person had ever been promoted in the Fire Department prior to the 1981 consent decrees.

Prior to entry of the decrees in August of 1981, counsel for the Birmingham Firefighters Association (B.F.A.) appeared in court on behalf of the B.F.A. and its President at a fairness hearing[8] and objected to the decrees on the ground that the affirmative action goals constituted illegal and unconstitutional race discrimination against white males. The Court considered this and other objections to the decrees and ruled that the decrees were fair and lawful.[9]

Starting eight months after the consent decrees were entered, several lawsuits were filed by white male city employees of the Fire Department and of other departments claiming, among other things, that the City was engaging in "reverse discrimination" in promotions because of the consent decrees. It is important to note that the Fire Department lawsuits contested the promotions of the very first blacks in the history of the Fire

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[8] Notice had been given of the proposed decrees and the fairness hearing to "all interested persons."

[9] Counsel for the B.F.A. declined the Court's invitation to offer any evidence at the fairness hearing. Counsel for the B.F.A. also failed to move to intervene at any time prior to the fairness hearing. The motion to intervene of the B.F.A. after the fairness hearing was denied by the district court as untimely. United States v. Jefferson County, 28 FEP Cases 1834 (N.D. Ala. 1981). The denial of intervention was affirmed on appeal and the BFA did not file for a writ of certiorari. United States v. Jefferson County, 720 F.2d 1511 (11th Cir. 1983). At the fairness hearing, a group of black employees objected to the decrees as inadequate and the white firefighters opposed any race-conscious relief. The Court overruled both sets of objections.

Department.[10] The claims of the white male firefighters and one white male engineer were tried first. In December 1985, after a five day trial which followed the taking of dozens of depositions, the district court dismissed the claims of the white male firefighters and the engineer as lacking merit and found that the challenged promotions were required by the City decree.[11] The Eleventh Circuit Court of Appeals reversed and remanded for another trial on the ground that the white male plaintiffs had a right to continue to litigate their separate lawsuits, and that the trial court may have dismissed their claims, in part, on the improper ground that they did not have a right to collaterally attack the consent decrees.[12]

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[10] The same counsel represented both the Birmingham Firefighters Association (B.F.A.) at the fairness hearing in the Martin case and the individual white male firefighters in the "reverse discrimination" cases. All of the white male plaintiffs in the "reverse discrimination" cases were members of the B.F.A. at the time of the fairness hearing in Martin. The same arguments were made with respect to the consent decrees in the "reverse discrimination" complaints, as in the objections at the fairness hearing. In part because of these facts, the Martin plaintiffs and the City argued that the "reverse discrimination" plaintiffs already had their "day in court."

[11] In re Birmingham Reverse Discrimination Employment Litigation 39 Fair Empl. Prac. Cas. (BNA) 1431 (N.D. Ala. Dec. 20, 1985). Chief Judge Sam C. Pointer, Jr. found, inter alia, that there would have been racial discrimination against blacks and that the white male engineer would have been promoted, because he was white, if the Consent Decrees had not existed. The district court held that collateral attacks are impermissible, and, in the alternative, that the claims of the "reverse discrimination" plaintiffs were without merit.

[12] In re Birmingham Reverse Discrimination Employment Litigation, 833 F.2d 1492 (11th Cir. 1987),. reh'g denied, 841 F.2d. 399 (11th Cir. 1988).

The Supreme Court granted each of the petitions for a writ of certiorari filed by the Martin plaintiffs, by the City and by the Personnel Board on the single issue of whether persons, having had an opportunity to be heard prior to the entry of a consent decree, nevertheless have a right to file separate lawsuits challenging such a decree.

The Lawyers' Committee and the City of Birmingham argued before the Supreme Court that the white firefighters did not have the right to undermine the finality of the settlement embodied in the consent decrees, given that they had had notice of the decrees and an opportunity to be heard prior to the entry of the decrees. The Court, in a 5 to 4 decision on June 12, 1989, rejected this argument.[13] Chief Justice Rehnquist, writing for the Court, held that such collateral attacks are permissible, rejecting the overwhelming majority rule of the Circuit Courts of Appeal.[14]

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[13] 490 U.S. ____, 104 L.Ed.2d 835, 109 S.Ct. 2180 (1989)

[14] See e.g. Marino v. Ortiz, 806 F.2d 1144, 1146-47 (2d Cir. 1986), aff'd, 108 S. Ct. 586 (1988) (per curiam); Culbreath v. Dukakis, 630 F.2d 15, 22-23 (1st Cir. 1980); Goins v. Bethlehem Steel Corp., 657 F.2d 62, 64 (4th Cir. 1981), cert. denied, 455 U.S. 940 (1982); Striff v. Mason, 849 F.2d 240, 245 (6th Cir. 1988); Stotts v. Memphis Fire Dept, 679 F.2d 541, 558 (6th Cir. 1982), rev'd on other grounds sub nom. Firefighters Local 1784 v. Stotts, 467 U.S. 561 (1984); Dennison v. City of Los Angeles Dep't of Water & Power, 658 F.2d 694, 696 (9th Cir. 1981); Thaggard v. City of Jackson, 687 F.2d 66, 68-69 (5th Cir. 1982), cert. denied sub nom. Ashley v. City of Jackson, 464 U.S. 900 (1983); Grann v. City of Madison, 738 F.2d 786, 795 (7th Cir.), cert. denied, 469 U.S. 918 (1984); EEOC v. McCall Printing Corp., 633 F.2d 1232, 1237 (6th Cir. 1980); Black and White Children of the Pontiac School Sys. v. School Dist., 464 F.2d 1030 (6th Cir. 1972) (per curiam) ("Black and White School Children"); Burns v. Board of School Comm'rs, 437 F.2d 1143, 1144 (7th Cir. 1971) (per

III. THE GENERAL IMPACT OF MARTIN v. WILKS

The Court's 5-4 ruling effectively ends finality for a host of litigated and consent decrees not only in the area of employment discrimination, but also in every other kind of litigation where there may be persons "adversely affected" by a court order. Long-settled cases are thus now open to periodic challenge by those dissatisfied with results, even if those persons knowingly had bypassed opportunities to intervene in the litigation.[15] This decision raises the prospect of repeated re-litigation of underlying claims.

In an interpretation of Rule 19 of the Federal Rules of Civil Procedure, the majority ruled that the only way to preclude a person "affected" by the provisions of a decree from challenging the decree in a subsequent suit is by mandatory joinder of

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curiam); Prate v. Freedman, 430 F.Supp. 1373, 1375 (W.D.N.Y.), aff'd mem., 573 F.2d 1294 (2d Cir. 1977), cert. denied, 436 U.S. 922 (1978); O'Burn v. Shapp, 70 F.R.D. 549, 552-53 (E.D. Pa.), aff'd mem., 546 F.2d 417 (3d Cir. 1976), cert. denied, 430 U.S. 968 (1977); Freeze v. ARO, Inc., 503 F.Supp. 1045, 1047-48 (E.D. Tenn. 1980); Jefferson v. Connors Steel Co., 25 Empl. Prac. Dec. (CCH) ¶31,602 at 19,486 (N.D. Ala. Jan. 19, 1981); Austin v. County of DeKalb, 572 F.Supp. 479, 481 (N.D. Ga. 1983). Other than the Eleventh Circuit, the only other Circuit to rule in favor of collateral attacks pre-Martin v. Wilks was a panel of the Seventh Circuit in Dunn v. Carey, 808 F.2d 555, 559-60 (7th Cir. 1986). Claims in all of the above cases, among others, are now subject to reopening because of the Martin v. Wilks decision.

[15] The Court had previously held that notice and the opportunity to be heard were sufficient to preclude people from later challenging a judicial determination, consistent with due process. See e.g. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-15 (1950); Mathews v. Eldridge, 424 U.S. 319, 333 (1976).

that person as a party, even if the person chose not to intervene. Moreover, instead of requiring persons who know their interests will be affected and who desire to be heard to come forward prior to the entry of a court order, the decision places the burden on the existing parties - including both plaintiffs and employers - to identify potentially affected persons and to join them as parties against their will.[16]

Justice Stevens, writing for the four dissenters, strongly opposed the decision because it would "subject large employers who seek to comply with the law by remedying past discrimination to a never-ending stream of litigation and potential liability. It is unfathomable that either Title VII or the Equal Protection Clause demands such a counterproductive result."[17]

Prior to the decision, numerous employers and employer groups filed amicus briefs urging the Supreme Court not to create such a procedural rule, on the grounds that it is expensive, unworkable, disruptive and unfair. These employers included thirty-two States, the Virgin Islands, and the District of Columbia, as well as numerous organizations representing state and local governmental employers and private employers throughout the country - the National League of Cities, the National

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[16] Thus, persons who do not believe they have a sufficient interest to be parties to the litigation nevertheless will be forced to be parties and, in many instances, will have to pay lawyers to represent them even though they are not being accused of any wrongdoing by anybody.

[17] 104 L.Ed.2d 835 at 863.

Governors' Association, the U.S. Conference of Mayors, the Council of State Governments, the International City Management Association, the National Conference of State Legislatures, the National Association of Counties and the Equal Employment Advisory Council (EEAC) (a national association of private employers comprising a broad segment of the business community nationwide). The only employer to file a brief supporting collateral attacks was the United States Department of Justice, which suddenly switched sides in 1984 and sued the City of Birmingham for promoting blacks under the Decrees the Justice Department itself had negotiated in 1981.[18]

The likely effects of the Martin v. Wilks ruling include an increased reluctance by both plaintiffs and defendants to settle cases, or at least without costly and extensive pre-

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[18] This happened in 1984 during the tenure of W. Bradford Reynolds, Assistant Attorney General for the Civil Rights Division of the Department of Justice during the Reagan Administration, despite the following:

* The Birmingham consent decrees were sought by, and entered during, the Reagan Administration.

* Mr. Reynolds stated the following, under oath, in hearings before the Senate Judiciary Committee in 1985, in response to a question by Senator Heflin of Alabama: "I did not disagree with the decree in any way between the time that it was submitted to the court and the time the court entered the decree." (Hearings before the Committee on the Judiciary, United States Senate, Ninety-Ninth Congress, First Session on the Confirmation of William Bradford Reynolds to be Associate Attorney General of the United States, June 4, 5 and 19, 1985, p. 907).

* The Department of Justice specifically promised in writing in the decrees to defend the lawfulness of the relief in the decrees against collateral attack.

settlement litigation, including the joinder of numerous additional parties. In addition, both supporters and opponents of the ruling agree that, as a result of the ruling, employment discrimination cases will be much more difficult to litigate.[19] The impact of the decision has been, to date, substantially greater in cases involving public employers using the results of tests (regardless of whether or not the tests are job-related) to list the order of the test-takers. This is because rank-ordering creates stronger expectations of hire, and especially, promotion. Because incumbent employees are more likely to claim an interest in the implementation of the decree than applicants, they are also more likely to file "reverse discrimination" lawsuits. In addition, at least one public sector employee association has funded and supported such collateral attacks.[20]

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[19] Mr. Reynolds' former deputy at the Department of Justice - Charles Cooper - who personally represented the Department in switching sides in the Birmingham litigation in 1984 - stated that the Martin decision was a "home run" for white men. "Every time someone gets passed over [for promotion] they have a new cause of action and a lawsuit," said Cooper, adding that "the process of entering consent decrees with racially preferential relief is going to be considerably more difficult" because of the Martin ruling. The Washington Post, June 13, 1989 at A4. Benna Solomon, Chief Counsel of the State and Local Legal Center, who filed an amicus brief in the Supreme Court on behalf of numerous state and local government organizations in support of the position of the City of Birmingham, said that the Martin decision "is going to make it extremely difficult to litigate, much less conclude, employment discrimination lawsuits because [bringing in all potentially affected parties] is not really feasible in the real world in many of these cases and that is the only avenue that the court will accept for precluding subsequent litigation of the same issue." The Washington Post, June 13, 1989 at A4.

[20] A June 15, 1989 memorandum from Alfred K. Whitehead, President of the International Association of Firefighters (IAFF) to all IAFF State, Provincial, and Local Union Presidents stated

It is far from clear what mechanism the Supreme Court majority expects parties to employ in terms of joining or otherwise precluding potentially affected parties from further litigation. Even after joinder of all known affected persons and extensive litigation, however, the Martin decision would still allow for litigation years later by any person who was not a party to the original proceeding. Finally, the decision has made at least some employers more reluctant to agree to affirmative action plans because of increased fear of incessant "reverse discrimination" litigation and multiple liability.

The impact of the Martin decision is particularly severe because of another case the Court decided shortly after Martin. Although the issue was not before the Court, the Supreme Court surprisingly stated in this case - Independent Federation of Flight Attendants v. Zipes - that because of its decision in Martin v. Wilks, Title VII plaintiffs defending decrees in collateral lawsuits "have no basis for claiming attorney's fees" against anyone in such lawsuits.[21] (Justice Marshall, in

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that "the International's Executive Board supported the (Martin v. Wilks) litigation financially through the approval of an EDF grant to Local 117 (Birmingham, Alabama), and further approved a request to file an amicus curiae ('friend of the court') brief on behalf of the firefighters who filed a complaint against the City and the Board seeking injunctive relief against enforcement of the decrees. ... The International believes that every person whose livelihood is affected... by a consent decree which he has not signed should have (the) right (to challenge the appropriateness of the consent decree)."

[21] 491 U.S. ____, 105 L.Ed.2d 639, 649, 109 S.Ct. ___(1989). Five members of the Court agreed with this statement.

dissent, called this "conclusory dicta of the worst kind".)[22] The five person majority suggested that since Title VII plaintiffs would "still face the prospect of litigation without compensation for attorney's fees before the fruits of their victory can be secure", it may not be too much of an additional disincentive to bringing Title VII litigation if plaintiffs cannot recover against intervenors.[23]

Justice Marshall, in his dissent, stated that the likely consequences of the Zipes decision will be for defendants to rely on intervenors to raise many of their defenses, thus minimizing fee exposure. Without hope of compensation for such expenditures, "many victims of discrimination will be forced to forego remedial litigation for lack of financial resources. As a result, injuries will go unredressed and the national policy against discrimination will go unredeemed." [24]

The Zipes ruling effectively denies attorney's fees to the victims of discrimination in all cases where they have had, or will have, to defend decrees in "reverse discrimination" litigation. Instead of providing an incentive for attorneys to represent Title VII claimants by providing attorney's fees when plaintiffs prevail, this decision would allow for endless litigation, without compensation, after relief is secured. The combined impact of Martin and Zipes is devastating to the

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[22] Id. 105 L.Ed.2d at 659 n.6.

[23] Id. at 649.

[24] Id. at 660.

prospects of securing and maintaining meaningful relief for the victims of employment discrimination.

IV. EXAMPLES OF LITIGATION SPAWNED BY MARTIN v. WILKS

Since the Supreme Court decision in Martin, new "reverse discrimination" cases have been filed in numerous localities including Birmingham, Alabama; Boston, Massachusetts; Cincinnati, Ohio; San Francisco, California; Toledo, Ohio; Memphis, Tennessee and Oakland, California, among others. Pre-existing "reverse discrimination" litigation has received a new lease on life and will continue for the foreseeable future. Issues that once seemed long resolved have now been reopened for repetitious litigation. Some of these cases will be discussed below.

A. BIRMINGHAM, ALABAMA

The Birmingham "reverse discrimination" litigation is proceeding anew in the district court after the Supreme Court decision in Martin v. Wilks. This litigation is likely to continue for many more years. Hearings and conferences have been held on September 1, 1989, November 21, 1989 and January 3, 1990, with intensive discovery again underway.[25] A trial on some of the dozens of pending claims is anticipated in 1990, with others

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[25] For example, depositions of eight City Council members in office at the time of the entry of the Decrees in 1981 started on January 29, 1990, with depositions of the City Attorney and the City's lead outside counsel scheduled to begin on February 15, 1990. Numerous motions, interrogatories and requests for documents have also been filed by counsel for the white fire-fighters.

held in abeyance until a later time.[26] In addition to numerous interventions of new plaintiffs in the existing litigation, another case has been initiated in Birmingham since the Supreme Court decision. Two white Deputy Sheriffs working for the Jefferson County Sheriff filed a lawsuit on July 19, 1989 alleging race and sex discrimination against them because blacks and women were finally promoted in more than token numbers to the first-level of supervision in the Sheriff's Department - Sheriff Sergeant. The plaintiffs in this new case claim that the Consent Decree with Jefferson County, Alabama, entered in March 1983 in the Martin litigation and the 1981 Personnel Board decree are unlawful.[27]

B. BOSTON, MASSACHUSETTS

Three "reverse discrimination" suits were filed in Boston in the early fall of 1989 - all attempting to reopen long-standing consent decrees, which in turn had ended years of litigation. Thirty-four (34) white male firefighter applicants filed a lawsuit on September 12, 1989, alleging race discrimination in hiring of blacks and Spanish-surnamed persons because of

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[26] Numerous "reverse discrimination" cases, each involving many claims, remain to be tried after the next trial - which will involve some of the Fire Department claims and one engineering department claim. The cases which will still be pending after the next trial involve most of the largest city departments, including the Fire Department, the Police Department and the Streets and Sanitation Department, among others.

[27] Williams v. Bailey, CV-89-PT-1241-S (N.D. Ala.). The portion of the case which went to the Supreme Court in Martin v. Wilks did not include any claims arising out of the County Consent Decree. Sheriff Bailey has been Sheriff of Jefferson County since January of 1963.

a decree entered in 1974 after a trial in 1973.[28] Thirty-five (35) white male police officer applicants filed a lawsuit on September 21, 1989 alleging race discrimination because of a consent decree entered in 1973.[29] Finally, thirty-four (34) incumbent white police officers filed a lawsuit on October 19, 1989 alleging race discrimination because "promotions to the rank of sergeant have been made in accordance with the consent decree" originally entered in 1980 and extended in 1985.[30]

C. SAN FRANCISCO, CALIFORNIA

Four new "reverse discrimination" cases have been filed against the City of San Francisco since the Martin v. Wilks

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[28] Mackin et. al. v. City of Boston et. al., Civil Action No. 89-2025-N challenges the Consent Decree entered in Boston Chapter, NAACP, Inc. v. Beecher, 371 F. Supp. 507 (D. Mass 1974), aff'd 504 F.2d 1017 (1st Cir. 1974), cert. denied 421 U.S. 424 (1975).

[29] Fagan et. al. v. City of Boston et. al., Civil Action No. 89-2076-N challenges the Consent Decree entered in Castro v. Beecher 365 F. Supp. 655 (D. Mass. 1973); See also Boston Chapter, NAACP v. Beecher, 679 F.2d 965, 968 (1st Cir. 1982). In 1971, the district court in Castro found race discrimination in the use of non-validated intelligence tests by Boston for police officer positions. The court also ruled that the tests were not rationally related to the capacity of applicants to be trained for or to perform police officer jobs. Castro v. Beecher, 334 F.Supp. 930 (D. Mass. 1971). The Consent Decree in Castro being challenged in Fagan was entered on April 15, 1973.

[30] Stuart et. al. v. Roach, et. al., No. 89-2348 Mc. challenges the Consent Decree dated October 31, 1985 in Massachusetts Association of Afro American Police, Inc. (MAAAP) v. Boston Police Department, 106 F.R.D. (D. Mass 1985), aff'd 780 F.2d 5 (1st Cir. 1985), cert. denied. 478 U.S. 1020 (1986). The MAAAP case was filed on March 2, 1978. According to the 1980 Consent Decree in the MAAAP case, which was attached as an Exhibit to the Stuart complaint, in March 1978, only 5.8 percent of the police officers, 1% of the police sergeants and none of the police lieutenants or captains were black. (Consent Decree, p. 2).

decision - involving the Fire Department, the Police Department, the public school system and the community college system. These cases continue indefinitely already lengthy litigation over discrimination in the City of San Francisco.

In the first filed of the San Francisco cases, white police officers brought a lawsuit in state court claiming race discrimination deriving from the implementation of a 1979 Consent Decree which in turn resolved a case filed in April 1973.[31] The case has been removed to the U.S. District Court for the Northern District of California. A second lawsuit was filed on November 21, 1989 by white firefighters - indirectly challenging the implementation of a decree which "ended" litigation that was initiated in 1970.[32] The plaintiffs in the original San Francisco firefighters case[33] (blacks, Hispanics, Asians and women) have already spent considerable time and money defending

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[31] Ratti v. The City and County of San Francisco, No. 911141 (Superior Court of Cal. for the City and County of San Francisco). Ratti was removed to the U.S. District Court for the Northern District of California - No. C-89-3577 RFP. A second amended Complaint was filed on January 12, 1990 in U.S. District Court. Ratti challenges the decree entered in Officers for Justice v. City and County of San Francisco, 473 F. Supp. 801 (N.D. Cal. 1979), aff'd 688 F.2d 615 (9th Cir. 1982), cert. denied sub nom Byrd v. Civil Service Commission of the City and County of San Francisco, 459 U.S. 1217 (1983).

[32] Van Pool v. City and County of San Francisco, No. 903108 (Superior Court for the City and County of San Francisco), Van Pool challenges the Consent Decree entered in U.S. and Davis v. San Francisco, 656 F.Supp. 276 (N.D. Cal. 1987), aff'd, 890 F.2d 1438 (9th Cir. 1989). An amended Complaint was filed on January 17, 1990 in U.S. District Court for the Northern District of California C-89-4304.

[33] Davis, supra.

affirmative action relief obtained from the San Francisco Fire Department against attack by white males.

The City has engaged in active discovery in the police case, including depositions of all six of the named plaintiffs to date. None of the plaintiffs could recount any incidents to support their allegations of harassment or that unqualified minorities have been promoted instead of qualified individuals. Precious City resources are being diverted to defend these "reverse discrimination" cases - resources which could be used to develop valid tests and meeting other goals of the Consent decree, not to mention other City problems. In addition, the case has become a rallying point for resistance to the desegregation of the San Francisco Police Department. Disgruntled white police officers have appeared for examinations, but then have not taken the exams. They have told the test administrators that they are there merely to preserve their legal rights.

In late January 1990, two cases were filed in state court by white teachers and teacher applicants against, respectively, the San Francisco Unified School District[34] and the San Francisco Community College District[35] claiming discrimination on

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[34] Davis et al. v. The City and County of San Francisco et al., C-915348 (Superior Court of California for the City and County of San Francisco). There is a 1983 Consent Decree in San Francisco NAACP et al. v. San Francisco Unified School District C-78-1445-WHO (N.D.Cal. 1983), which provides, in part, that the School District maintain certain goals in the employment of teachers.

[35] Fowler et al. v. The City and County of San Francisco et al., 915350 (Superior Court of California for the City and County of San Francisco).

the basis of race, sex and/or national origin in the hiring of teachers. Both of these cases were filed in state court and removed to the U.S. District Court for the Northern District of California.[36]

The experience in San Francisco, among other locales, is that the "reverse discrimination" cases have been counter-productive to one of the principal policy rationales articulated by the Supreme Court for encouraging settlement of litigation - to end rancor and to facilitate a peaceful and rapid solution to the nation's racial, ethnic, and gender problems.

D. OAKLAND, CALIFORNIA

A little more than one month after the Supreme Court decision in Martin v. Wilks, on July 27, 1989, ten white and Hispanic male applicants for firefighter positions, and Local 55 of the International Association of Firefighters, sued the City of Oakland, California, and its officials alleging that a May 1986 consent decree unlawfully discriminates against them on the basis of race and gender. The Complaint in this case explicitly states that the case is brought "pursuant to the decision" in Martin v. Wilks "as a collateral attack" upon the 1986 Consent Decree, "which imposed race-and-gender conscious remedies for future hiring into the Oakland Fire Department."[37] As the

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[36] Davis is now C-90-0286-TEH (N.D.Cal.). Fowler is now C-90-0288-DLJ (N.D.Cal.).

[37] Complaint in Petersen et al. v. The City of Oakland, California et al. C-89-2784-WHO (N.D. Cal., July 27, 1989), ¶5 and ¶6, p. 3. The Petersen case collaterally attacks the Consent Decree entered in the case of Nero v. City of Oakland, Civ. No.

existing Consent Decree is the primary vehicle for the entry of women and Asians into the Fire Department, this attack has disrupted the orderly process for the desegregation of the department. In addition, the City and black, Asian and women's firefighter organizations have had to divert their resources from tasks such as recruitment of qualified applicants to fighting this rear-guard attack on a decree settled years ago.

E. ALBANY, GEORGIA

Another example of the adverse consequences of the Martin v. Wilks decision can be seen in a continuing case arising from the City of Albany, Georgia. As far back as 1971, two black employees of Albany's water department contacted union representatives to complain about blatant race discrimination in the City - including segregated restrooms, segregated water fountains and lesser pay for blacks than for whites for the same job.[38]

After a labor strike over the issue of unequal treatment of black and white employees, several black public works and water, gas and light employees initiated a class action suit against the City of Albany alleging a pattern or practice of race discrimination against black job applicants, incumbent black employees and blacks who were discharged in violation of 42 U.S.C. §1981 and §1983 and the Fourteenth Amendment.[39] Title VII

C-85-8448-WHO, which was entered on May 1, 1986, according to the Complaint (¶5 on p. 3).

[38] Johnson et al. v. City of Albany, Georgia, 413 F.Supp. 782 (M.D. Ga. 1976).

[39] Id., 413 F.Supp. at 787.

of the Civil Rights Act became applicable to the City of Albany and to other state and local governmental employers on March 24, 1972 and the complaint was accordingly amended to include Title VII claims.[40] After four years of litigation, including a trial, the district court in Johnson v. City of Albany concluded that "[f]rom an overall standpoint in every respect white employees and applicants for employment were favored over black employees and applicants for employment."[41] The district court issued a comprehensive injunction in 1976 which included affirmative action relief.[42]

In 1985, J. Dale Mann, a white male, filed a "reverse discrimination" suit claiming he was a victim of race discrimination because of a hiring decision made pursuant to the Johnson decree. The district court held Mann bound by the Johnson decree because the City "virtually represented" Mann's interests in the Johnson litigation.[43] Following Martin v. Wilks, the Eleventh Circuit ruled this holding to be in error and remanded the case to the district court, where, after almost twenty years, the Albany litigation continues. If Martin v. Wilks had been decided the other way, the Mann case would have been dismissed and the Albany litigation would finally have been over.

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[40] Id., 413 F.Supp. at 787-788.

[41] Id., 413 F.Supp. at 799, cited in Mann v. City of Albany, Georgia, 883 F.2d 999, 1000 (11th Cir. 1989).

[42] Mann, supra, 883 F.2d at 1000-01.

[43] Id. 883 F.2d 999 at 1003 citing Mann v. City of Albany, 687 F.Supp. 583, 587 (M.D. Ga. 1988).

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F. TOLEDO, OHIO

On January 16, 1990, in Toledo, Ohio, nine (9) white applicants for firefighter positions with the City of Toledo filed a lawsuit alleging that they should have been appointed to firefighter positions under their interpretation of a 1974 consent decree.[44] The plaintiffs assert that they were not parties to a August 21, 1989 court order which modified the way hiring for black and white firefighter trainees was done under the decree. The plaintiffs challenge procedures established in the August 1989 Order.

G. CINCINNATI, OHIO

Two "reverse discrimination" cases are now pending against the City of Cincinnati because of the Martin v. Wilks decision. The first of these cases was filed in February 1989 before Martin,[45] but received new life after the Martin decision despite previous Sixth Circuit rulings against collateral attacks.[46] The plaintiffs in this case are white firefighter

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[44] Bembenek et al. v. Winkle et al., 3:90CV-7016 (N.D.Ohio) (January 16, 1990). The Consent Decree at issue was originally entered in 1974 resolving an action filed seventeen years ago. See Brown v. Neeb, 644 F.2d 551 (N.D.Ohio 1981). The Consent Decree has been modified from time to time by the Court with the latest revision being August 21, 1989. Brown v. Winkle C 72-282 (N.D.Ohio 1989).

[45] Jansen et al. v. The City of Cincinnati et al., C-1-89-079, (S.D.Ohio, February 2, 1989).

[46] See e.g. Striff v. Mason, 849 F.2d 240, 245 (6th Cir. 1988), Stotts v. Memphis Fire Dep't, 679 F.2d 541, 558 (6th Cir. 1982), rev'd on other grounds sub. nom. Firefighters Local 1784 v. Stotts, 467 U.S. 561 (1984); E.E.O.C. v. McCall Printing Corp., 633 F.2d 1232, 1237 (6th Cir. 1980).

applicants who allege race discrimination because of a Consent Decree originally entered in 1974. The second case was filed on October 5, 1989 (post-Martin) and alleges race and sex discrimination against white males in police department hiring because of what the plaintiff contends is a misapplication of a 1981 Consent Decree.[47] The Fraternal Order of Police had intervened as a party in the litigation which led to the 1981 decree.[48]

H. GADSDEN, ALABAMA

To our knowledge, to date, there has been only one district court ruling on the merits subsequent to the Supreme Court decision in Martin v. Wilks regarding a collateral attack on a consent decree. This case arose out of Gadsden, Alabama.[49] The ruling has been appealed to the Eleventh Circuit Court of Appeals.[50] Although blacks comprise approximately 20% of the population of Gadsden, prior to 1979, Gadsden never had a black firefighter. In 1978, a lawsuit was filed against Gadsden challenging the exclusion of blacks from firefighter jobs. A consent decree resulted providing for race-conscious hiring. In 1987, white firefighters filed suit attacking this decree.

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[47] Vogel v. City of Cincinnati No. C-1-89-683 (S.D.Ohio, November 14, 1989).

[48] U.S. v. City of Cincinnati, No. C-1-80-369 (S.D. Ohio, August 13, 1981).

[49] Henry v. City of Gadsden, Alabama 715 F.Supp. 1065 (N.D.Ala. June 30, 1989).

[50] No. 89-7521 (11th Cir.) (pending). Oral argument was held on January 25, 1989.

On June 30, 1989, after a trial, the district court entered judgment in favor of the City of Gadsden finding that "there had been no blacks - the inexorable zero - in the Gadsden Fire Department" and that the rights of the white firefighters were not unnecessarily trammeled ("plaintiffs have already been positioned so that, in all likelihood, they will be promoted to the position of driver ahead of the blacks against whom they complain").[51] Although the "reverse discrimination" case was finally adjudicated by the trial court, the case is still pending on appeal after two and one-half years of litigation and it is likely to continue for some time.

I. MEMPHIS, TENNESSEE

Three "reverse discrimination" cases challenging actions taken under consent decrees have been filed against the City of Memphis, Tennessee since the Supreme Court decision in Martin v. Wilks. The first of these cases was filed in August 1989 by twenty-six (26) white male police officers alleging race discrimination in promotions to the position of Investigator made in 1988 because of consent decrees entered in 1979 and 1981.[52] A

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51 715 F.Supp. at 1068.

52 Ashton v. City of Memphis No. 97640-3 (Chancery Court of Shelby County, Tennessee) (August 28, 1989). This state court case was removed to U.S. District Court - 89-2863 HA (W.D.Tenn.). The Ashton case challenges promotions made pursuant to a 1979 consent decree entered in Afro-American Police Association v. City of Memphis C-75-380 (W.D.Tenn. 1975) which involved hiring and promotions in the Memphis Police Department and a 1981 consent decree entered in U.S. v. City of Memphis, C-74-286 (W.D.Tenn.). The 1981 consent decree amended a November 1974 consent decree entered in U.S. v. City of Memphis. The decrees

second case was filed in late January 1990 by twenty-five (25) white male police officers alleging race discrimination in promotions to the position of Investigator made in 1989 because of the same 1979 and 1981 consent decrees.[53] A third lawsuit, also filed in late January 1990, involves the Memphis Fire Department. This case was brought by two (2) white male firefighters who allege race discrimination in promotions to Fire Lieutenant and Fire Investigator, respectively, because of consent decrees entered in 1977 and 1981.[54]

J. OMAHA, NEBRASKA

In 1979, a lawsuit brought by the Brotherhood of Midwest Guardians, an organization of black police officers, by individual black police officers and by an individual black applicant for a police officer position alleged race discrimination in hiring and promotions by the City of Omaha, Nebraska.[55]

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in U.S. v. City of Memphis involved relief for race and sex discrimination in various departments of the City of Memphis.

[53] Aiken v. City of Memphis, 90-2069 HA (W.D.Tenn. January 23, 1990).

[54] Davis v. City of Memphis, 90-2068 HA (W.D.Tenn. January 23, 1990). The Davis case challenges promotions made under a 1980 consent decree in Stotts v. City of Memphis, C-77-2104 (W.D.Tenn.) and under the 1981 decree in U.S. v. Memphis, supra. The 1980 Stotts decree resolved litigation initiated in 1977. See Stotts v. Memphis Fire Department, 679 F.2d 579 (6th Cir. 1982) for a history of the Stotts and U.S. v. Memphis litigation. See Stotts v. Memphis Fire Dept., 679 F.2d 541, 570-579 (6th Cir. 1982), rev'd on other grounds sub nom. Firefighters Local 1784 v. Stotts, 467 U.S. 561 (1984) for the text of the 1974 consent decree in U.S. v. City of Memphis and the 1980 consent decree in Stotts.

[55] Brotherhood of Midwest Guardians, Inc. et al. v. City of Omaha et al. C.A. No. 79-0-528 (D.Neb.).

In 1980, the United States filed a lawsuit against the City of Omaha alleging a pattern and practice of race discrimination in the Omaha Police Division.[56] These two lawsuits were settled in a consent decree entered on October 23, 1980.

In 1984, five (5) years before Martin v. Wilks, the Eighth Circuit Court of Appeals affirmed the dismissal of a "reverse discrimination" case filed by a white male applicant for a firefighter position with the City of Omaha on the ground that the City acted pursuant to a "bona fide affirmative action plan".[57] At least two "reverse discrimination" cases initiated in 1988 are still pending against the City of Omaha concerning promotions in the police department pursuant to the 1980 decree - one involving promotions to Police Lieutenant and the other involving promotions to Police Sergeant.[58] In addition, at least five (5) cases have been filed since the Supreme Court decision in Martin v. Wilks on the administrative level with the Nebraska Equal Opportunity Commission and the E.E.O.C. by white males claiming race discrimination in the Omaha Police Division in promotions to Police Sergeant because of the 1980 consent

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[56] U.S. v. City of Omaha, et al, C.A. No. 80-0-631 (D.Neb.).

[57] Warsocki v. City of Omaha, 726 F.2d 1358, 1360 (8th Cir. 1984).

[58] Donaghy v. City of Omaha, C.A. 88-0-321 (D.Neb. April 26, 1988) and Wade and Invener v. City of Omaha, 871568 (Douglas County District Court for the State of Nebraska, September 16, 1988).

decree.[59]

K. CLEVELAND, OHIO

In Cleveland, Ohio, a consent decree was entered on January 31, 1983 resolving litigation initiated in 1980 regarding race discrimination in the Cleveland Fire Department.[60] Two "reverse discrimination" cases were filed in 1986 by six individual white firefighters and a local firefighters association alleging race discrimination in promotions because of the decree.[61] Despite the fact that the association was a party to the consent decree litigation, because of Martin v. Wilks, these cases are both still pending after almost three years of "reverse discrimination" litigation[62] and nine (9) years of litigation

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[59] All of these cases were filed administratively in September or October 1989.

[60] Firefighters v. Cleveland, 478 U.S. 501 (1986).

[61] Local 93, International Association of Firefighters, et al. v. City of Cleveland, et al., C-86-2858 (N.D. Ohio, July 8, 1986) and Copperman et al. v. City of Cleveland, C-86-2399 (N.D. Ohio, June 5, 1986). A motion to dismiss was filed by the City of Cleveland on August 15, 1986. The Court did not rule on the motion prior to Martin v. Wilks. After Martin was handed down, the Court asked for supplemental briefs on the applicability of Martin. This motion is still pending. No motion to dismiss was filed in Copperman, pending the outcome of the motion filed in Local 93. The cases have been treated as consolidated by the court.

[62] Indeed, the Court appeared to be saying in Martin that the firefighters can make a clain as a party to the consent decree litigation and make the same claim again in separate post-decree litigation, as long as they do not sign the consent decree:

> "A voluntary settlement in the form of a consent decree between one group of employees and their employer cannot possibly 'settle,' voluntarily or otherwise, the conflicting

over race discrimination in the Cleveland Fire Department.

V. CONCLUSION

The impact of the Martin v. Wilks decision is clear. Cases settled long ago are subject to endless litigation even by people who had opportunities to participate in the original lawsuit. New settlements are discouraged because of employers exposure to multiple liability. The courts, already overburdened, face increasing dockets with lawsuits seeking to relitigate claims already heard. The concept of finality in employment discrimination litigation has been destroyed.

> claims of another group of employees who do not join in the agreement. This is true even if the second group of employees is a party to the litigation:
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> '[P]arties who choose to resolve litigation through settlement may not dispose of the claims of a third party ... without that party's agreement. A court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of nonconsenting intervenors. Firefighters v. Cleveland, 478 US 501, 529, 92 L Ed 2d 405, 106 S Ct 3063 (1986).'"

Martin v. Wilks, supra, 104 L.Ed.2d at 848.

PREPARED STATEMENT OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

The Associated General Contractors of America (AGC) appreciates the opportunity to provide this statement on S. 2104, the "Civil Rights Act of 1990," to the Senate Committee on Labor and Human Resources. AGC believes the following comments on S. 2104 will contribute to the Committee's effort "to restore and strengthen civil rights laws that ban discrimination in employment." In this regard, AGC respectfully requests that this statement be made a part of the record of the Committee's proceedings.

AGC fully endorses the policy and objectives of all of our nation's civil rights laws. AGC is also fully prepared to support corrective measures that are found to be necessary, and then constructively crafted. However, AGC regrets that it cannot support S. 2104. Quite apart from doubts about the need for several of the bills major provisions, AGC cannot agree that the bill has been constructively crafted.

The proponents of S. 2104 express certainty that recent Supreme Court decisions have "cut back dramatically on the scope and effectiveness of civil rights protections," as the prologue to the bill declares. Even if the proponents are correct, the fact remains that this proposed response to those decisions would neither restore nor strengthen civil rights. The provisions of S. 2104 neither serve its stated purpose, nor further the larger goals of a nation committed to civil rights and civil liberties.

If enacted, the bill would become a powerful engine of proportional employment, subordinating each individual's unique characteristics to his or her race, color, religion, sex and/or national origin. The bill would distort the purpose of the original legislation, at great cost to the principles and ideals of the Civil Rights Act of 1964.

The bill also offends fundamental notions of fair play. As it drove employers to achieve someone's notion of "parity," the bill would also increase the penalties for the intentional discrimination that would remain the indispensable condition of a workforce perfectly balanced not only by race and sex, but also color, religion and national origin. The bill also strays from the bedrock American view that all citizens shall have equal access to the courts -- and that all are entitled to their day in court. The bill would even leave employers liable for labor union activities that employers cannot control.

S. 2104 would also open the door to another round of litigation over the now widely discredited theory of comparable worth. The bill so disregards the now sound rules on the use of statistical data that even comparisons between different occupational groups might have to be accepted.

Following are further comments reflecting each of AGC's major concerns.

I. S. 2104 Is A Powerful Engine Of Proportional Employment.

Today a racial disparity in an employer's workforce violates Title VII of the Civil Rights Act of 1964 (Title VII) unless:

- the disparity is unintended;
- the employment practice (or practices) that caused the disparity are significantly related to a legitimate business purpose; and
- no known alternative having a less adverse impact is available.

In Wards Cove Packing Co. v. Atonio, 109 S.Ct. 2115 (1989), the Supreme Court made it absolutely clear that employers must satisfy all three requirements in order to escape

liability for a statistical disparity that correlates with race, color, religion, sex or national origin.

S. 2104 says that that is not enough. The bill would amend Section 703(k) of Title VII to require employers to eliminate all workforce disparities that run along the lines of race, color, religion, sex and/or national origin, unless employers can prove that the disparities -- whether due to specific employment practices, or the result of the entire employment process -- are nothing less than "essential to effective job performance."

If there is one area where the proponents and the opponents of S. 2104 should be able to agree, it is in this area of "business necessity," as broadly defined by the bill. Almost no employment practices, much less disparities in an employer's workforce, are "essential to effective job performance." It may be that many employment selection criteria tend to improve job performance, and are even predictive of effective job performance, but precious few are "essential."

There are exceptions. It may be absolutely essential for a movie producer or director to hire and use an individual of a particular race, sex or ethnic background to play a particular role. It may be essential for law enforcement officials to hire individuals who fit a specific profile in order to infiltrate a band of criminals with common physical characteristics. But these kinds of exceptions are few and far between. One could argue that a law degree is essential to entering the legal profession. But plainly, it is <u>not</u> essential for a law graduate to be a member of a school's law review, or at the top of his or her class, or a clerk for a federal or state judge. It may be preferable, but it is not essential to effective job performance.

One is hard pressed to identify many circumstances that make it essential to use specific employment practices. The merit selection of professional athletes in football, basketball, baseball, and ice hockey causes wide racial and ethnic disparities. Having the best players is undoubtedly important to effective job performance. It is certainly preferable, but strictly merit selection, even in the realm of professional sports, is not essential. The Senate bill would condemn the current employment practices in this and most other areas of American business, and insist on mediocrity, all to promote "parity."

Some have said that Section 4 of S. 2104, and the related definitions, have created a "quota bill." There is much truth to the charge. This portion of the bill does not address what most Americans would consider to be discriminatory behavior. Rather, the expansive restatement of the disparate impact theory places a premium on numerical "parity." The provision coerces employers to resort to proportional hiring and promotion, not only by race and gender, but also by color, religion and national origin.[1]

In short, in the name of civil rights, S. 2104 would compel employers to practice discrimination. An individual's skin color, sex, religious beliefs, and ancestry would all become critical selection criteria, largely determining who would enter and move through the workforce.

And the cost imposed on the nation -- and especially the civil rights movement -- would be enormous. What the nation soundly condemned more than

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[1] To make matters worse, the bill neglects to define "parity." Employers will search the bill in vain for a comparative benchmark for satisfying the new proportionality standard. Is it the local labor market, including adjacent areas, or the national labor market? Does it include skilled and unskilled workers, or just those having "essential" skills? Is there to be any consideration of who is actually interested in a particular job, or are wholly disinterested persons to be counted? If the bill's expansive restatement of the disparate impact theory is to be the new civil rights standard, then Congress should at least draft a bill which explains what this means.

twenty-five years ago would now be condoned. The evil of discrimination would become the instrument of statistical "parity." The tremendous moral authority of the civil rights movement would succumb to a new generation's less than inspiring demand for a strictly proportional "piece of the action."

II. S. 2104 Is A Catch-22.

Section 4 of the bill, and the related definitions, are so broad and imprecise that they would embroil employers in senseless litigation for many years. Again and again, lawyers would debate workforce "parity" -- what it to means, and whether it has been achieved. The catch is that S. 2104 also condemns the only means of achieving that vague objective. In order to pass the multi-layered balancing test found in Section 4 of the bill, employers would have to engage in the intentional discrimination which the bill would make the basis for jury awards of compensatory and punitive damages. In order to satisfy those who insist on workforce "parity," employers would have to accept Title VII liability, including liability for compensatory and punitive damages, for intentional discrimination against the applicants and employees who found that "parity" had locked them out. The first round of litigation would cause a second, and the second a third, and on and on.

Employers would find it impossible to extricate themselves from this Title VII litigation. Their good faith efforts to comply with "parity" requirements -- to eliminate non-essential disparities in their workforce -- would necessarily lead them to identify, hire and promote applicants and current employees by race, color, religion, sex and national origin. Predictably, those same efforts would expose employers to litigation from another

quarter -- from those who continue to demand that the selection process be free of the invidious distinctions that Title VII has condemned since 1964.

And yet, if employers faithfully obeyed the command to abstain from intentionally discriminatory employment practices -- if they wholly ignored the skin color, gender, religion and ethnic background of all applicants and current employees -- the forbidden disparities would surely surface. Either way the employer turned, he or she would find that S. 2104 had guaranteed a violation of one provision or another -- a nonsensical "guilty if you do, guilty if you don't" scenario that hardly serves civil rights objectives.

III. S. 2104 Deprives Citizens Of Equal Access To The Courts.

In the name of "finality," the bill would place heavy and most probably unconstitutional burdens on non-parties to civil rights judgments. A non-party who subsequently sought to challenge such a judgment, because it had created the kind of affirmative action program that entails preferential treatment for the members of certain groups, would find that Congress had simply closed the courthouse door to his or her claim of discrimination, based on race, color, religion, sex, or national origin.

In Martin v. Wilks, 109 S. Ct. 2180 (1989), the Supreme Court followed bedrock American notions of fair play, and ruled that the courthouse door remains open to future claims of discrimination that may grow out of litigated or consent judgments. Every citizen should have his or her day in court. Applicants and employees who are not parties to civil rights arrangements should not be bound by their terms. Even if non-parties had notice of a judgment, they should have the opportunity to later contest its use to deprive them personally of opportunities for hire or promotion.

S. 2104 seeks to overturn that ruling. It would require anyone with actual or constructive notice of a civil rights judgment to assert any objections to the judgment prior to its entry -- or forever lose the right to challenge the judgment (except on grounds of fraud, collusion, transparent invalidity or lack of subject matter jurisdiction). The bill would similarly cut off the rights of non-parties with no notice of the judgment if their "interests" were "adequately represented by another person," or "reasonable efforts were made to provide notice to interested persons."

This sounds very much like "court-stripping." Section 6 of the bill generally prohibits the courts from considering a broad range of constitutional and statutory claims that will not ripen, as to non-parties, nonwithstanding notice, until well after the entry of the discriminatory judgment.

Section 6 probably falls under its own weight. Fundamental due process considerations, implicated in Martin v. Wilks, cast great doubt on the power of Congress to deprive citizens of any meaningful opportunity to have their bona fide claims of discrimination heard by the federal courts.

Beyond that, one would have expected that legislation proposed "to restore and strengthen civil rights laws" would remain faithful to the fundamental constitutional ideal of "equal treatment under law." That is not the case with regard to Section 6. As it shuts out non-parties' claims against civil rights judgments, the bill holds the litigation door open to those who are parties to such arrangements. The same plaintiffs could sue employers repeatedly, and at any time, if dissatisfied with the court-ordered program.

So much for "finality." What S. 2104 truly seeks to achieve is very selective access to the courts. The proponents of proportional employment would get their day in court,

but those who dared to oppose their drive for "parity," because it deprived them of a job or a promotion for clearly invidious reasons, would find themselves locked out.

Ironically, by separate provision, the bill would preserve nearly identical claims of discrimination that could grow out of seniority systems. In that context, the apparently flawed standard that the Supreme Court announced in Martin v. Wilks (i.e., that citizens may sue whenever a judgment deprives them personally of a job opportunity) is curiously acceptable. Again, AGC questions the asserted interest in the finality of litigation.

In the end, AGC finds it difficult to believe that Congress is genuinely prepared to deprive an Asian American student of any meaningful opportunity to challenge preferences for African Americans simply because the student had notice of a civil rights judgment that took on meaning only upon his or her graduation from school, and entry into the relevant labor market. While, S. 2104 appears to bar such a claim, AGC believes that Congress will ultimately line up with the constitution, and the American sense of what is fundamentally fair, by rejecting Section 6 of S. 2104.

IV. S. 2104 Creates Vicarious Liability For A Labor Union's Intentional Discrimination.

In General Building Contractors Association v. Pennsylvania, 458 U.S. 375 (1982), the Supreme Court soundly rejected the argument that employers bear vicarious liability for a labor union's intentional discrimination in making referrals out of a hiring hall. The Court found that common law agency principles, with their emphasis on control, led to the contrary conclusion that employers are not the "masters" of the labor unions with whom they negotiate. The Court explained:

> In the run of cases, the relationship between an employer and the union that represents its employees simply cannot be accurately characterized as one between principal and agent or master and servant. Indeed, such a conception is alien to the fundamental assumptions upon which the federal labor laws are structured.
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> • • •
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> While authorizing collective bargaining and providing means of enforcing the resultant contracts, the National Labor Relations Act expressly prohibits employers from compromising the independence of labor unions. See 49 Stat. 157, as amended, 29 U.S.C. § 158; 61 Stat. 157, as amended, 29 U.S.C. § 186. The entire process of collective bargaining is structured and regulated on the assumption that "[t]he parties -- even granting the modification of views that may come from a realization of economic interdependence -- still proceed from contrary and to an extent antagonistic viewpoints and concept of self-interest. NLRB v. Insurance Agents, 36 U.S. 477, 488, 45 LRRM 2705 (1960). See Vaca v. Sipes, 386 U.S. 171, 177, 64 LRRM 2369 (1967).

458 U.S. at 393-394.

The proponents of S. 2104 have not explained their apparent objections to General Building Contractors Association, and have not provided any other basis for imposing vicarious liability on an employer for a labor union's intentional discrimination. Yet, S. 2104 would make Title VII into a ready vehicle for such liability.

As already discussed, Section 4 of the bill creates liability for any "group of employment practices" that have a disparate impact, for example, on minorities or women. Section 3 defines that already broad phrase to include the "overall employment process." These critical phrases easily reach all wages, hours and other terms and conditions of employment, whether or not subject to collective bargaining. More to the point, the phrases are easily broad enough to render employers liable for entirely neutral terms and conditions that have a disparate impact only because a labor union engages in intentional discrimination. Section 4 is entirely focused on "results." No matter how

crafted, a hiring hall provision in a collective bargaining agreement will result in a racial disparity if the labor union intentionally discriminates against racial minorities in making referrals. The same could be said of other provisions that give labor unions a significant role in the employment process, including provisions on safety and productivity. In fact, the same could be said of all labor unions activities that affect employment decisions.

What makes all of this fundamentally unfair is that employers have no control over labor unions. In fact, the national labor policy continues to run strongly against any effort to create any means of exercising such control.

V. S. 2014 Revives The Widely Discredited Theory Of Comparable Worth.

The proponents of S. 2104 have similarly seized the occasion to open up Title VII to claims of comparable worth. The civil rights laws already condemn unequal pay for equal work. These laws do not, however, require employers to pay the same wages for different jobs simply because a statistical construct, untied to the realities of labor supply and demand, deems the different jobs to be "comparable" in their "worth." Congress and the courts have routinely rebuffed such notions.

S. 2104 takes another run at "comparable worth" in the same way that the bill seeks to create vicarious liability for a labor union's intentional discrimination. As already noted, the bill defines a "group of employment practices" to include the "overall employment process." There is unquestionably enough mischief in that latter phrase to permit a court to test an employer's wage and salary decisions for their impact. Indeed, in the two cases in which it expressly rejected the argument that Title VII already provides for claims of comparable worth, the U.S. Court of Appeals for the Ninth Circuit

saw no basis for concluding that Congress intended the current language of the statute to reach "an overall employment process," as distinct from the specific employment practices that the statute now identifies (e.g., hiring, promotion, discharge).[2]

The bill under consideration would clear that hurdle for the comparable worth theorists, and subject employers to endless litigation over the argument that the pay for one job should be adjusted to correspond to the pay for another, allegedly comparable job, in order to eliminate any non-essential disparity. If such a result is to come out of federal legislation, Congress should, at the very least, address the matter forthrightly, and be precise in the scope, coverage and any intended implications of such a law.

CONCLUSION

The foregoing does not exhaust the full range of AGC concerns over S. 2104. AGC doubts that the current remedies for intentional discrimination, or the current rules on expert and attorneys' fees, have tended to deter Title VII litigation. AGC also doubts that Title VII should create liability for thoughts -- however repugnant -- that have not had any effect on anyone's employment.

In addition, AGC is uncomfortable with the bill's disregard for the presumption of innocence that all fields of law regularly afford defendants accused of wrongdoing. Under Section 4 of the bill, the "wrongdoing" is not "acting with bias or prejudice." It is, instead, engaging in employment practices that result -- for reasons that a plaintiff need

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[2]See State, County and Municipal Employers v. Washington, 770 F. 2nd 1401 (9th Cir. 1985); Spaulding v. University of Washington, 740 F.2d 636 (9th Cir.), cert. denied, 469 U.S. 1036 (1984).

not identify -- in a disparity in the workforce. The bill condemns any workforce disparity that correlates with race, color, religion, sex or national origin. It is enough for the plaintiff to identify such a disparity and allege it is due to employment practices. The bill then triggers the presumption that the employer is guilty of "wrongdoing" -- a presumption so strong that the employer can rebut it only with proof that the questioned disparity is a matter of "business necessity."

Thus, the quota trap has been cleverly set. As already stated, exceedingly few disparities can be explained in terms of "business necessity." Few are "essential to effective job performance." Accordingly, the vast majority of employers will find that the bill gives only one choice: to resort to proportional hiring and promotion by race, color, religion, sex and national origin. With the passage of S. 933, the "Americans with Disabilities Act" (which by its terms will become a part of Title VII), it is a safe bet that this newly constructed regimen will also require a proportional share of employment opportunities to go to handicapped individuals.

Presumably, the proponents of this legislation regard it as but an unfortunate consequence of their pursuit of "parity" that employers who acquiesce to the pressure to achieve statistical balance will inevitably find themselves hounded by litigants complaining of the intentional discrimination that preferential hiring and promotion -- based on race, color, religion, sex and national origin -- inevitably entails.

The struggle for civil rights was once a struggle against the discriminatory behavior that divided society along invidious lines. The principle that stirred this country to action in the late 1950s and the early 1960s was derived from the Fourteenth Amendment's guarantee of equal treatment for all individuals, without regard to group memberships

or affiliations. The watchword was nondiscrimination and the national dream was judgment based on the content of each individual's character, and not the color of anyone's skin.

S. 2104 seeks to legislate a dramatic change in that original and still inspirational civil rights agenda. No longer are we to be overly concerned with discrimination; it can be condoned, we are told, in pursuit of "parity." Individual rights and liberties can be sacrificed for group entitlements. Congress can subordinate the content of an individual's character to the deadening prejudgments of race, color, religion, sex and national origin, so long as what emerges from the process is a "proportional workforce," acceptable to all those burgeoning interest groups vying for a piece of the societal pie. That is this bill's idea of "restor[ing] and strengthen[ing] civil rights laws that ban discrimination in employment."

AGC hopes that Congress, in its consideration of this legislation, will note: 1) that it does not now apply to Congress; and 2) how Congress would view it if it did.

Respectfully, AGC requests the members of this Committee to reflect on the original principles and ideals of the Civil Rights Act of 1964. No one would claim that the nation has yet achieved the objectives of that historic legislation. AGC would, however, caution that the nation must be careful, or it will lose sight of those objectives, and thereby delay their achievement.

NATIONAL
ASSOCIATION
of
COUNTIES

440 First St. NW, Washington, DC 20001
202/393-6226

March 22, 1990

The Honorable Senator Edward M. Kennedy
Chairman
Labor and Human Resources
SR-315 Russell Senate Office Building
Washington, DC 20510-2101

Dear Senator Kennedy:

Enclosed please find a copy of our recently adopted resolution urging Congress to enact S. 1204, the Civil Rights Act of 1990. On behalf of county governments across the nation, I commend you for taking the lead in introducing legislation to overturn a number of adverse Supreme Court rulings.

These decisions have restricted the application and enforcement of our nation's anti-employment discrimination laws. Not only have they striped away the protection available to women and minorities to fight discrimination in the work place but have also undermined our ability to enforce affirmative action plans at the state and local level.

The Supreme Court's ruling in Martin v. Wilks has left counties with affirmative action plans in a "Catch 22" situation. In that decision, the Court ruled that judicially approved plans can be later challenged by employees who feel adversely affected by any employment decision resulting from the plans. If we enforce the plans, we can be sued for reverse discrimination. If we do not enforce them, we can be sued for not carrying out our end of the agreement.

Your bill provides a reasonable solution. All employees would be notified and given the opportunity to challenge any aspect of the plan before it goes into effect. However, once agreement is reached, the plan becomes final, thus closing the door on endless lawsuits.

Again thank you for your leadership on this important issue and please feel free to call Larry Jones if you have any questions.

Sincerely,

Ann Klinger

Ann Klinger
President

The Personnel Board of Jefferson County, Alabama

361 COURTHOUSE ANNEX

BIRMINGHAM, ALABAMA 35263-0439

JAMES B. JOHNSON, Chairman
PATRICIA A. HOBAN-MOORE, Associate
RODERICK BEDDOW, JR., Associate

DAVID T. GRAF,
Director of Personnel

March 12, 1990

Honorable Howard M. Metzenbaum
Senator, Ohio
Committee on Labor and Human Resources
SD-428 Dirksen Building
Washington, D. C. 20510-6300

Dear Senator Metzenbaum:

We would respectfully request that the following statement be entered as testimony on behalf of the Jefferson County Personnel Board, Defendants in Martin v. Wilks, 110 S.Ct. 11, 106 L. Ed. 2d. 626 (1989), in connection with the hearings held before this Committee on Wednesday, March 17, 1990, on the Civil Rights Act of 1990.

We wholeheartedly support the passage of the Civil Rights Act of 1990.

The Jefferson County Personnel Board has deep immediate concerns about the impact of the decision by the United States Supreme Court in the Martin v. Wilks case.

The key provision of the Act which is of dire necessity to the Personnel Board is Section 6. Facilitating Prompt and Orderly Resolution of Challenges to Employment Practices Implementing Litigated or Consent Judgment on Orders.

Since the decision in Martin v. Wilks, we have sustained new lawsuits in Federal Court, and charges filed with the United States Equal Employment Opportunity Commission seeking a collateral attack on the Consent Decree litigated in Martin v. Wilks and originally entered in U.S. v. Jefferson County, et al. 28 FEP Cases 1834 (ND Ala. 1981), Affirmed, 720 F 2d. 1511 (CA 11, 1983).

Under Martin v. Wilks, a defendant in a class action Title VII lawsuit, must endeavor to bring to the settlement table all represented class members and all potentially

affected interests of non-class members. Martin v. Wilks sets a standard with no end. It is impossible to know all potentially affected interests of non-class members in a society growing ever more culturally and racially diverse.

The prospects are that since we serve over 23 jurisdictions, including the City of Birmingham, and Jefferson County, we could be sued by employees in each of them, and be forced to defend numerous times, the Consent Decree in U.S. v. Jefferson County. This would result in cost prohibitive litigation, of a singular issue which, under the terms of the Martin v. Wilks decision, has no resolve.

We urge adoption of Section 6, and the Civil Rights Act of 1990.

Sincerely,

James B. Johnson

Roderick Beddow

Patricia Hoban-Moore

/bnh

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

HUBERT H. HUMPHREY, III
ATTORNEY GENERAL

GOVERNMENT SERVICES SECTION
525 PARK STREET
SUITE 500
ST. PAUL, MN 55103
TELEPHONE: (612) 297-2040
FACSIMILE: (612) 297-2576

March 20, 1990

Honorable Augustus F. Hawkins
United States Representative
2181 Rayburn House Office Building
Washington, D.C. 20515

Honorable Edward M. Kennedy
United States Senator
315 Russell Senate Office Building
Washington, D.C. 20510

Re: Civil Rights Act of 1990

Dear Senator Kennedy and Representative Hawkins:

We, the undersigned Attorneys General, wholeheartedly support passage of the Civil Rights Act of 1990. We are deeply disturbed by the decisions of the United States Supreme Court in Patterson v. McLean Credit Union, Wards Cove Packing Co. v. Atonio, Martin v. Wilks, Price Waterhouse v. Hopkins, and Lorance v. AT&T Technologies. Each of these decisions constitutes a setback to effective prosecution of acts of discrimination. Collectively the decisions appear to reflect a reordering of national priorities, downgrading our commitment to protecting human rights. Enactment of the Civil Rights Act of 1990 is critical not only to restore the civil rights protection that these decisions have undermined but also to reassert the commitment of our nation to combatting the evils of discrimination.

Unfortunately, the adverse effects of these decisions are not limited to enforcement of federal civil rights statutes. The inevitable result of these decisions, unless overruled, will be to place a greater burden on states' resources because plaintiffs will be forced to seek to enforce their rights under state rather than federal law. Shifting the burden of protecting human rights to the states is simply not an effective solution for several reasons. First, many states have looked to federal precedent to interpret their state law counterparts to federal civil rights laws. They

have now been placed in the position of having to relitigate principles of longstanding acceptance in civil rights actions. Issues of burden of proof, statutes of limitation, theories of recovery and the like suddenly are in disarray. Settlement negotiations have been chilled as a result of Martin v. Wilks, which creates the prospect of a consent decree being challenged years after its adoption by the parties. Second, a shift to the states would undoubtedly create problems with respect to uniform enforcement among the states. Finally, and most important, the lack of strong federal leadership would set a tone of tolerance towards discriminatory attitudes and conduct. While the states can attempt to assume a greater burden in the fight to enforce civil rights, in the long run, without strong federal leadership, our efforts will be to no avail. Congress needs to send the clear message that its commitment to eliminating discrimination remains firm and that it will act quickly to counteract erosion of its intent.

We hope that the passage of the Civil Rights Act of 1990 will remove the burdens and uncertainties that these U.S. Supreme Court decisions have created and will reaffirm the commitment of our nation to the aggressive protection and enforcement of human rights. Please call upon us if we can be of any service in the passage of this important legislation.

Sincerely,

Clarine Nardi Riddle
Attorney General of Connecticut

Robert M. Spire
Attorney General of Nebraska

Tom Miller
Attorney General of Iowa

Brian McKay
Attorney General of Nevada

James E. Tierney
Attorney General of Maine

Robert Abrams
Attorney General of New York

Frank J. Kelley
Attorney General of Michigan

Nicholas Spaeth
Attorney General of North Dakota

Mike Moore
Attorney General of Mississippi

Hector Rivera-Cruz
Attorney General of Puerto Rico

Hubert H. Humphrey, III
Attorney General of Minnesota

Roger W. Tompkins
Attorney General of West Virginia

James M. Shannon
Attorney General of Massachusetts

PREPARED STATEMENT OF THE NATIONAL EDUCATION ASSOCIATION

The National Education Association represents 2 million professional and support employees in America's elementary, secondary, vocational, and postsecondary schools. We appreciate this opportunity to express our strong support for legislation to expand federal civil rights protection.

The Civil Rights Act of 1990, S. 2104/H.R. 4000, is necessary to restore the intent of Congress in Title VII of the Civil Rights Act of 1964 and Section 1981 of Chapter 42 of the U.S. Code. In addition, this measure would clarify and expand protections for job bias victims.

NEA has long supported preserving and strengthening basic civil and human rights under the law, as well as eliminating barriers restricting the individual exercise of rights. Protection from employment discrimination on the basis of race, religion, national origin, or gender -- in initial employment and subsequently -- is of vital interest to NEA members. Moreover, retaining employees' right to challenge discriminatory acts when they have occurred as well as protecting settlements from endless challenges are essential elements to nondiscrimination policies that are meaningful and consistent.

Over the years, many NEA members have had to resort to the courts seeking protection from discrimination. We do not have complete records on all of the cases, nationwide, that our state and local affiliates have pursued. But as of March 1, 1990, NEA and its affiliates are currently involved in at least 25 cases that rely on Title VII and at least

four cases that rely on Section 1981. Specifically, there are at least 11 cases involving race discrimination, six of which rely on Title VII for relief; 23 cases of sex discrimination, eight of which rely on Title VII for relief; and nine cases involving sexual harassment, four of which rely on Title VII.

These existing cases cover a wide range of discriminatory adverse actions, including dismissal, demotion, failure to obtain a promotion, poor performance evaluation, involuntary transfer, and discriminatory pay practices. The cases also cover a wide spectrum of the education profession, including teachers, education support employees, and higher education employees. Complaints involving NEA members seeking remedy under Title VII are pending, as of March 1, 1990, in 14 states: California, Colorado, Florida, Illinois, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, Ohio, Oklahoma, Pennsylvania, and Wisconsin.

The Civil Rights Act is critical to NEA members who need strong federal antidiscrimination laws that will continue protection throughout employment, protect against unfair tests or other practices that result in illegal discrimination, protect against discrimination even when legal motives may produce the same result, give reasonable opportunity to challenge discriminatory practices, and preserve the ability of employers and employees to agree on

remedies to discrimination without the threat of endless challenges.

The Civil Rights Act of 1990 is necessary to overturn five recent decisions by the U.S. Supreme Court that limit the scope of protection under federal civil rights law.

On-the-Job Protection

The effect of Patterson v. McLean Credit Union is a legal principle that is absurd: that individuals have a right to protection against discrimination in initial employment but that features of that protection end on the day the employee first reports to work. Within a few months after Patterson, almost 100 discrimination claims have been dismissed, and future claims are pointless unless the appropriate intent of Section 1981 is restored. In addition, lower courts are in disarray over the application of Section 1981 to promotions, discharges, retaliations, demotions, and other employment practices.

The Civil Rights Act of 1990 would reaffirm Congress' intent that Section 1981 cover all benefits, terms, and conditions of a contractual relationship. Moreover, it would prohibit discrimination in promotions, demotions, discharges, and retaliation.

Disparate Impact

The Supreme Court's ruling in Wards Cove Packing Co. v. Atonio has served to undermine the precedent set in 1971 in

policy is challenged, the statute of limitations may have run out by the time it does have an adverse effect.

The Civil Rights Act of 1990 would clarify that the time within which a Title VII charge must be filed begins to run when the unlawful practice occurs or is applied to adversely affect the complaining party, whichever is later. In addition, the time for filing an administrative charge with the Equal Employment Opportunity Commission would also be extended from 180 days to two years.

Collateral Challenges

The Supreme Court ruled in Martin v. Wilks that white firefighters who challenged a consent decree -- a settlement in a prior discrimination lawsuit under Title VII -- had grounds to challenge that agreement. The Court held that the firefighters could not be bound by the consent decree unless they had been joined as a party in the prior litigation. Wilks also appears to apply to fully litigated relief orders as well as consent decrees.

Following Wilks, employers have no incentive to agree to a consent decree in settling disputes, since the decree can be challenged, theoretically without end. The ruling undermines the stablility of court-ordered remedies in discrimination cases.

The Civil Rights Act would establish certain standards for providing interested persons who are not party to a suit with notice and an opportunity to be heard in litigation or

in a proposed séttlement. The measure would then bar subsequent challenges by nonparties where these standards have been met.

Right To Recover Damages

At present, remedies under Title VII -- for race, gender, national origin, and religious discrimination -- are limited to injunctive relief and limited compensation, such as back pay or reinstatement, while remedies under Section 1981 -- limited to racial discrimination -- can include awards for compensatory and punitive damages for victims of discrimination.

The Civil Rights Act would correct this anomaly by amending Title VII to provide for compensatory and punitive damage awards for racial and other types of illegal discrimination. Exceptions would be made in cases against the government, and jury trials would be available in cases where damages are sought. Punitive damages could be awarded only where the discriminatory employment practice was intentional.

Civil Rights Enforcement

The Civil Rights Act would also enhance access to justice for victims of discrimination in a number of areas, including: 1) protecting the ability of job bias victims to secure legal assistance and to incur necessary litigation expenses, such as expert witness fees; 2) conforming the

award calculations in federal government cases; and 3) restoring the traditional rule of broad construction of federal civil rights laws.

Conclusion

American history is the account of a nation founded on high ideals of justice and equality, a nation that has moved to broaden -- rather than narrow -- the interpretation of justice and equality. The Civil Rights Act of 1990 is consistent with that history, and it is a vital measure necessary to correct current inequities under the law. Your support for this measure is an opportunity for Congress to show leadership on the road toward full equality. NEA urges Congress to pass this legislation promptly and without weakening amendment.

PREPARED STATEMENT OF THE INTERNATIONAL PERSONNEL MANAGEMENT ASSOCIATION

The International Personnel Management Association (IPMA) appreciates the opportunity to submit its comments on the "Civil Rights Act of 1990" (S. 2104, H.R. 4000). IPMA strongly supports both the goal of eliminating employment discrimination and the use of affirmative action to eliminate the effects of past discrimination. The Association endorses the statement by Justice Brennan in the landmark case of Johnson v. Transportation Agency, Santa Clara County that "voluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace."

IPMA is an organization representing over 1,300 member agencies that include civil service commissions, merit system boards and personnel departments at the federal, state and local levels of government. The Association also represents 55,000 individuals, primarily human resource professionals and managers in the public sector and educators in the fields of public and personnel administration. IPMA's objective is to provide a focus and a forum for the discussion and exchange of views among human resource professionals throughout the United States and abroad.

In response to several of the decisions by the United States Supreme Court, the Association in 1989 adopted a resolution on equal employment opportunity/affirmative action which reaffirms IPMA's "dedication to the active pursuit of equal employment opportunity programs augmented by affirmative action, until need no longer exists to remedy past discrimination" (Attachment). In 1984, the Association adopted a resolution which stated IPMA supported the continued use of equal employment opportunity/affirmative action programs with numerical goals and timetables until their need no longer exists.

The Association agrees with the sponsors of this proposal that corrective legislation is needed for some aspects of the Supreme Court's rulings in the following cases: Martin v. Wilks, Lorance v. AT&T Technologies, Wards Cove Packing Company v. Atonio, and Patterson v. McLean Credit Union. IPMA believes the Price Waterhouse v. Hopkins decision represented a victory for plaintiffs and snould not be expanded by legislation. We also are opposed to the compensatory damage and jury trial provisions of the legislative proposal.

Martin v. Wilks

In this decision, the Supreme Court, by a five-to-four vote, ruled that nonminorities who were not a party to a consent decree which settled employment discrimination litigation could bring an

action challenging the consent decree. The Association is concerned the Supreme Court's decision in this case will make it difficult for employers to settle charges of employment discrimination since this will not end their potential liability. An individual hired after a consent decree was approved could potentially, under this ruling, have standing to challenge the terms of the decree. Public employers should not be precluded from settling cases of employment discrimination on an equitable basis due to a concern this will result in protracted litigation.

The Association believes one of the goals of Title VII is to encourage the conciliation of charges of employment discrimination. The Association also believes employers should be urged to undertake voluntary affirmative action efforts. The use of carefully tailored voluntary affirmative action plans has been endorsed by the Supreme Court in the cases of United Steelworkers of America v. Weber and Johnson v. Transportation Agency, Santa Clara County and the Association supports these decisions.

IPMA endorses the provisions contained in Section 6 of the legislation since we believe it will restore the necessary balance between encouraging conciliation and preserving rights of parties to challenge the terms of a proposed decree in a timely manner. We hope in the interim, the federal district courts will follow the Northern District of Alabama which, in the case of

Henry v. City of Gadsden, decided after the Wilks case, dismissed a reverse discrimination challenge to a consent decree that provided for a one-to-one hiring ratio for minority and nonminority firefighters.

Lorance v. AT&T Technologies

The Supreme Court decided in this case that where an employer and a union have negotiated a modification to a seniority system, the statute of limitations for challenging the system as being discriminatory begins to run from the date of its adoption. While recognizing Section 703(h) of Title VII provides special consideration for seniority systems, the Association believes this case was wrongly decided. As a result of this decision, individuals covered by a seniority system will find themselves in the anomalous position of having to file a charge of anticipatory discrimination to preserve their rights to challenge the seniority system. If they wait until they are actually affected by the seniority system, due to the Lorance decision, they may find their action barred by the statute of limitations.

While the Association supports legislation to modify this decision, we believe it should be narrowly drafted so that it only affects the holding in this case. The Association is opposed to the provisions in Section 7 of the legislative proposal which would increase the statute of limitations to two

years. We believe this would create an additional administrative and recordkeeping burden on employers. In addition, after two years it may be difficult due to turnover, promotions and reassignments, for employers to determine what actually occurred. IPMA believes the present statute of limitations is equitable for all parties and should not be modified.

Wards Cove Packing Company v. Atonio

In this case, the Supreme Court modified the disparate impact theory to require a plaintiff who seeks to establish a prima facie case to identify the specific employment practice(s) that caused the statistical disparity. Once a prima facie case is established, the court ruled an employer has the burden of producing evidence of a business justification for its employment practice. Significantly, the majority modified the business necessity standard originally established by the Supreme Court in 1971 in the landmark Griggs v. Duke Power Company decision. The court believed the employer must demonstrate the challenged practice significantly serves its employment goals but there is no need for the "challenged practice to be essential or indispensable to the employer's business...." In the Griggs case, the Supreme Court stressed "the touchstone is business necessity," and Congress has placed on the employer the "burden of showing that any given requirement must have a manifest relationship to the employment in question."

The Association supports reinstatement of the standards enunciated in the Griggs decision. However, we believe the legislation should be limited to restoration of Griggs. IPMA believes proposed definition (n) which defines the term "group of employment practices" to mean "a combination of employment practices or an overall employment process" goes far beyond the holding in Griggs. Under this definition, anytime there was a statistical disparity, an employer's entire employment process could be subject to review.

IPMA also is concerned that proposed definition (o) which provides the term "required by business necessity" means essential to job performance also goes beyond merely reinstating the Griggs standard. IPMA believes this requirement would establish a burden which would be very difficult, if not impossible for employers to meet.

If the Committee desires to reinstate the Griggs standards, we would recommend also reexamining the Supreme Court's 1988 decision in the case of Watson v. Fort Worth Bank and Trust. In this case, the Supreme Court extended the disparate impact theory to subjective employment practices. IPMA along with the Society for Human Resource Management and the Employment Management Association filed an amicus curiae brief in this case. The brief argued "the limited purpose of disparate impact analysis is to review specific employment devices which have the effect of

systematically excluding members of protected groups from employment opportunities." This decision could result in employers having to attempt to validate scientifically its subjective employment decisions which would be a very costly burden, particularly for small employers. This could leave employers with the option of hiring to maintain numerical balance in order to avoid costly litigation, rather than hiring the best qualified individuals.

Patterson v. McLean Credit Union

In this decision, the Supreme Court narrowed the scope of Section 1981 so that a claim of racial harassment could not be maintained. The majority appeared to prefer that claims of racial harassment be brought under Title VII. The Association supports the elimination of racial harassment and endorses Section 12 of the legislation which would overturn the Patterson decision to include the performance, modification, and termination of contracts.

Price Waterhouse v. Hopkins

The Supreme Court ruled that in a mixed motive case, an employer must prove, by a preponderance of the evidence, it would have made the same decision even if it had not taken the illegitimate factor into consideration. The court believed in a mixed motive

case, the employers' burden should be viewed as an affirmative defense giving them the burden of justifying their decisions. This represents a shift from the evidentiary framework established for disparate treatment cases by the Supreme Court in the decision of McDonnell Douglas Corporation v. Green. In mixed motive cases, employers now have the more difficult task of proving, by a preponderance of the evidence, the affirmative defense that it would have made the same decision absent consideration of the illegitimate motive.

IPMA believes this decision represents a substantial victory for plaintiffs and no additional legislation is needed on this issue. Proposed section 5 would expand the Price Waterhouse decision to find an unlawful employment practice when an illegitimate consideration was a motivating factor. This provision would leave employers with no defense and is opposed by IPMA.

Damages

Section 8 of the legislation would amend Title VII to allow for compensatory damages and a jury trial in all cases involving intentional discrimination. The Association opposes the awarding of compensatory damages since this will result in a reluctance on the part of plaintiffs to conciliate cases. Concomitantly there will be an explosion in the amount of litigation filed by plaintiffs seeking large monetary awards. How will already

overburdened federal courts be able to handle these additional cases? Public jurisdictions will have only two options when faced with large awards-raising taxes or reducing services. IPMA believes the conciliatory goal of Title VII should be continued, which requires the removal of compensatory damages from the legislation. If the Committee is unwilling to do this, we believe the Committee should recognize the special nature of the public sector and exempt it from the compensatory damages provision, as was done with punitive damages.

Conclusion

The Association is pleased to submit its views on this important piece of legislation. While agreeing with the sponsors of this legislation that the Supreme Court has, in several instances, upset the balance maintained in employment discrimination cases for many years, IPMA believes any legislation should be limited to restoring the status quo and should not include the awarding of compensatory damages, increasing the statute of limitations, and jury trials.

EQUAL EMPLOYMENT OPPORTUNITY/AFFIRMATIVE ACTION RESOLUTION

WHEREAS: Commendably, for the past several years, considerable gains in employment minorities and women have been made, as a result of aggressive affirmative action/equal employment opportunity programs; and

WHEREAS: In large measure these gains occurred as a result of legal decisions made by the Courts, specific legislation, progressive support from local, state and federal levels of government, and the cooperation of the private sector; and

WHEREAS: The U.S. Supreme Court in recent rulings in the cases of City of Richmond v. J. A. Croson, Co., Martin v. Wilks, Patterson v. McLean Credit Uion, and Wards Cove Packing Co. v. Atonio which dealt with minority business enterprise programs, reverse discrimination challenges to court-approved consent decrees, narrowing the scope of Section 1981 of the Civil Rights Act of 1866, and making it more difficult for plaintiffs to establish a disparate impact case dealt a critical blow to affirmative action in both public contracting and employment programs; and

WHEREAS: There is real evidence that racial and sexual discrimination in government still exists; and

WHEREAS: These Supreme Court rulings means that Federal, state and local governments must find new ways to ensure economic fairness and equal employment for racial and ethnic minorities and women; now therefore be it

RESOLVED: That the International Personnel Management Association as the largest organization representing public sector personnel professionals, with active members in agencies throughout the United States, Canada and other countries, reaffirms its dedication to active pursuit of equal employment opportunity employment programs augmented by affirmative action, until need no longer exists to remedy past discrimination; and let it further be

RESOLVED: That this resolution be directed to all appropriate parties and the IPMA Executive Council determine best methods for implementing this resolution.

The EQUITABLE
Financial Companies

Coy Eklund
Retired Chairman

February 27, 1990

Dear Senator Kennedy:

I understand that your committee is currently holding hearings on the Civil Rights Act of 1990. I regret that my schedule prevents me from appearing before your committee in the next several weeks. Nonetheless, I want to express my strong support for the legislation, and ask that you include my views in the record of the hearings on the bill.

As I understand it, the Civil Rights Act of 1990 will restore the anti-discrimination law to where it stood before the Supreme Court issued a series of decisions last year which significantly reduced the legal options available to people claiming to be victims of job discrimination. I hope that the Congress sees fit to pass the law since I think the Supreme Court was wrong in tampering with the anti-bias protections that have worked well, both for employees and for business, since 1971.

In 1983, I retired after serving for 10 years as President and Chairman of The Equitable Life Assurance Society. During those years, I witnessed a transformation in the makeup of the workforce, from one dominated by white males to one that reflected the diversity of American society.

Much of this transformation was accomplished after employers were impelled by law to reexamine practices that posed barriers to minorities and women and to adopt hiring and promotion practices that were more inclusive. After the 1971 Griggs v. Duke Power case, in order for an employer to continue a hiring or job requirement that discriminated against minorities and women, the employer had to be able to prove that its practices were justified as a "business necessity." From my vantage point at the head of a large corporation, that rule did not require us to adopt "quotas", and we did not. What we did do was to change our hiring and promotion practices so that we began to hire and promote more women and minorities.

787 Seventh Avenue
New York, NY 10019

We found that hiring and promoting more women and minorities was good for our business. For example, in the 1930's, Equitable actively eschewed marketing its insurance policies in the black community. Now the company has the largest number of black salespersons of any major insurer and, as a consequence, has a large number of black policyholders. Moreover, once we lowered the barriers to the advancement of women into middle and upper management levels, we found there was a large pool of highly capable, experienced women with long service to the company. These women could be promoted quite rapidly, to the benefit of the company. Other benefits I have observed over the 18 years since the Griggs case included improved morale of our workforce, more favorable publicity for our company, and the intangible gains from a staff that felt itself a part of a socially responsible organization.

I believe that there was no need to change the rules governing job discrimination especially since the corporate community not only had learned to live by the rules, but, in my view, had experienced many benefits from the workplace changes that were firmly in place until last summer. I applaud your efforts to restore the law to the certainty that has existed for 18 years.

Yours truly,

Roy Ehrman

Chairman, Emeritus

BRADLEY, ARANT, ROSE & WHITE
1400 PARK PLACE TOWER
BIRMINGHAM, ALABAMA 35203
TELEPHONE 521-8000 AREA CODE 205
TELEX 4941324

March 8, 1990

Direct Dial (205) 521-8348

The Honorable Edward M. Kennedy
United States Senator
Chairman
Senate Labor and Education Committee
315 Senate Russell Office Building
Washington, D. C. 20510-2101

Re: Hearings on S. 2104

Dear Senator Kennedy:

I represent the City of Birmingham in the litigation spawned by *Martin v. Wilks* and, in that capacity, I attended the Committee hearings on S. 2104 which were held on March 7, 1990. The first three witnesses, including my client Mayor Richard Arrington, Jr., testified about the Birmingham Reverse Employment Discrimination Litigation.

At the outset we appreciate that the Committee hearings are not a rehash of the case or a review of whether the Supreme Court's decision in *Wilks* was either correct or incorrect. Nonetheless, the Birmingham case was the subject of much comment, some of which was uninformed. I am especially troubled by the inference which could perhaps be drawn from Captain Henson's testimony that a firefighter, who was reasonably mindful of his rights, could have had any misunderstanding about the 1981 settlement of the original race and sex discrimination cases brought against the City of Birmingham. The facts concerning the notice of that settlement are as follows:

1. Until 1968 the City of Birmingham's Fire and Rescue Service was a white preserve.

2. Until 1982, and after the adoption of the 1981 consent decree, no black served as an officer in the Fire Service.

3. The Birmingham Firefighters Association, to which Captain Henson belonged, was keenly aware of the attack on the civil service system rules which yielded a predominately white Fire Department. Attached as Exhibit "A" to this letter please find the affidavit of Billy Gray, a former President of the Birmingham Firefighters Association, who testified that he followed and monitored the case. Also attached please find a "circular" (Exhibit "B") which was, we understand, distributed to the union membership. The suggestion that Mr. Henson, or other white firefighters, could have been unaware of the settlement proposal in 1981 is implausible.

4. Finally, as Mayor Arrington noted in his testimony, the Court of Appeals in the 1983 appeal found that the Firefighters were aware that their rights were implicated at an early time.

Certainly had Captain Henson attended the fairness hearing there could be no doubt as to the nature of the relief proposed and its effect: whites in the Fire Department for the first time, were required to share promotional opportunities with blacks. In the course of that public hearing, a colloquy, concerning the operation of the limited racial preferences involved, occurred between counsel for the City of Birmingham and the Federal District Judge. The relevant portion of the transcript is attached as Exhibit "C." There is no merit in the suggestion that a white firefighter would have to await the promotion of a black to understand how the decree would operate.

I recount these matters and ask that this letter and its attachments be included in the record to buttress the observations of Senator Adams to the effect that these cases are normally widely publicized and followed closely especially by those whose interests and rights may be implicated as well as the public at large. I do not believe that Captain Henson's testimony can be accepted as a general statement that the white firefighters were not aware of their rights when the settlement was publicized in connection with the fairness hearing.

We believe that Section 6 of the proposed legislation provides effective mechanism for notice and the procedures involved in Section 6 certainly provide a much superior alternative to the piecemeal and perpetual litigation which is dictated by *Martin v. Wilks*.

We appreciate the courtesies extended by you and your staff to Mayor Arrington.

Respectfully submitted,

James P. Alexander

Attorney for the City of Birmingham

JPA/sbb
Enclosures
cc: Mayor Richard Arrington, Jr.

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 75-P-0666-S
JEFFERSON COUNTY, et al, Defendants.	)	
JOHN W. MARTIN, et al, Plaintiffs,	)	
vs.	)	CIVIL ACTION NO. 74-Z-17-S
CITY OF BIRMINGHAM, et al, Defendants.	)	
ENSLEY BRANCH OF THE N.A.A.C.P., et al, Plaintiffs,	)	
vs.	)	CIVIL ACTION NO. 74-Z-12-S
GEORGE SEIBELS, et al, Defendants.	)	

AFFIDAVIT OF BILLY GRAY

My name is Billy Gray. I am a lieutenant in the Birmingham Fire Department. I am President of the Birmingham Firefighters Association No. 117. When the above referenced litigation was commenced in 1974, I consulted with Mr. Joseph Curtin, Director of the Personnel Board, concerning the status of the Birmingham

Firefighters Association and the Firefighters in general, as far as the above referenced litigation is concerned. We expressed to the Personnel Board our concern that the interest of the firefighters and of other City employees be adequately represented in resisting the claims of the Government and other persons in these cases. We were assured that the Personnel Board would defend these cases vigorously. Relying on the Personnel Board, the Firefighters did not petition the Court for status as parties in the litigation.

During the intervening years in which these suits have been tried and appealed, we kept in contact with the Personnel Board and assisted them by supplying pertinent data requested by them.

The proposed consent decrees which are presently before the Court are the first instance in which the interests of the Personnel Board and the Firefighters have become opposed to one another. The Firefighters desire to intervene in this action solely for the purpose of contesting the legality of the proposed consent decrees. Neither I nor the Firefighters were aware of the negotiations which were taking place between plaintiffs and defendants in these cases until the formal notice of the consent decrees was given.

This 4th day of August, 1981.

Billy Gray

Subscribed and sworn to
before me this 4th day
of August, 1981.

Notary Public

EXHIBIT B

June 23, 1981

FIREFIGHTERS:

Included with this letter is my brief synopsis of the Consent Decree signed by the City of Birmingham and Federal Judge Sam Pointer's Court.

Two initial points need to be made;

(1) This is a voluntary agreement, we are not under any requirement to settle or create an Affirmative Action Program of this type.

(2) I am not against any Affirmative Action Program. However, this particular document not only exceeds anything reasonably expected but violates practically all Civil Service and merit requirements.

It is important that all members of the Fire Department read the specific proposals being suggested. This document effects all levels of this department. This is your future. Your working conditions, promotions, and expectations are covered in this document.

There is hope. It appears the City Council under a good faith resolution was led to believe that this action was the result of specific Federal requirements. Instead of a voluntary document as suggested. The Council never read the full text of this agreement. Thereby opening the possibility of separate Council action as well as our own.

It is interesting to note the media coverage of the selection of Police Chief. It appears the Mayor is refusing to settle on grounds that this consent decree will free him from the responsibility of answering merit requirements from the Personnel Board. He can select anyone he(wants)certifies.

Unfortunately it is even more comprehensive. It virtually allows him to create his own hiring and promotion lists"regardless of state and local law". He is not required to promote City of Birmingham employees. In order to reach his affirmative quota he may go outside the City to recruit qualified black applicants for City supervisory positions.

For years our Union has attempted to gain a voice in management to assist all our members. The City has fought us on all points. Now however, according to this decree three to five employees ,selected by the Mayor, within each Dept. has the right to review "transfers and assignments" within their departments. In addition each Supervisor will be evaluated (in part)on their cooperation with the City appointed Affirmative Action Officer.

Individually there are several steps you can take. Contact all City employees you know, it affects them as well. The City Council, Personnel Board and State Officials will be contacted but your emphasis will bring the points home. Remember that your wive's have a stake in this as well do not underrate their potentials. They may have contact with Civic Groups or others that might help in this fight.

Remember, we are not fighting Affirmative Action but the Specific provisions of the plan submitted by the Mayor.

I would appreciate any comments, suggestions and additional help in this endeavor. Please contact me at Station 16 (A) 785-1001 or home: 674-1365.

Sincerely Submitted

WILLIAM P. MURRAY

'FIREFIGHTER'

This is an attempt to present to the firefighter's a reasonable synopsis

of the consent agreement to Federal Judge Pointer from the City of B'ham

"...to avoid the burdens and expense of any further litigation in these actions and to insure that any disadvantages to blacks and women that may have resulted from any past discrimination against them are remedied..."

I. General

2. Nothing herein shall be interpreted as requiring the City to hire unnecessary personnel, or to hire, transfer, or promote a person who is not qualified,or to hire, transfer or promote a less qualified person, in preference to a person who is demonstrably better qualified based upon the results of a job related selection procedure.

II. GOALS

5. The City agrees to adopt as a long term goal, subject to the availability of qualified applicants (percentages based on civilian labor force of Jefferson County (1980 census)). It further agrees to modify these percentages where it can be shown that a professional degree, license or certificate is required.

(A) GOALS FOR BLACKS

6. Subject to availability of qualified black applicants at the rate of 50% Firefighter and 50% Fire Lieutenant or at the rate of black representation among applicants whichever is higher.

8. In order to correct past underrepresentation of blacks in the Fire Department the City shall promote one black (subject to the availability of qualified candidates) to the next two (2) Captain's vacancies. Thereafter in vacancies to the positions of Captain and Battalion Chief at twice the black percentage representation in the job classifications from which promotional candidates are traditionally selected for those jobs.

(B) GOALS FOR WOMEN

---- Fire Dept. - 15%

(C) Implementation of Goals

10a. In cases where candidates have been found unqualified or unavailable for appointment, the City shall request that the Personnel Board certify sufficient numbers of qualified blacks and women to meet the goals of this decree. In this regard the City may request that the Personnel Board certify qualified blacks and females who are not incumbent employees of the City of Birmingham.

10b. In the event the Personnel Board is unable or unwilling to furnish lists containing qualified blacks or females the City, regardless of any state or local law:

(i) Directly recruit blacks and women.

(ii) Considering existing black and female City employees for promotion, whether or not such candidate was certified by the Personnel Board and supplementing any such non-conforming list furnished by the Personnel Board with such persons as are deemed qualified by the City.

III. AFFIRMATIVE ACTION PLANS

11. Each Dept on an annual basis shall submit to the mayor, for his approval, an affirmative action plan. The plan shall set forth the affirmative steps taken to increase the employment and upgrading of blacks and women.

IV. Recruitment

14. As part of its recruitment program the City shall utilize black and female recruiters for the Police add Fire Dept.

V. JOB POSTING

----everywhere

VI. Sex Restrictions in job announcements and & certifications

---none allowed

Page 2 of synopsis for Firefighter's of City of B'ham Consent agreement.

VII Height and Weight Requirements

---None

VIII ELIGIBILITY TO APPLY FOR PROMOTION TO CERTAIN JOBS

19b. Two years uninterrupted service in rank to take the LT's test Employees who have obtained permanent status as Fire LT's or CPT's have no other time in grade requirements.

IX Promotional Potential Ratings

--- None if adverse impact can be proven. Present system has already been declared invalid.

X BACKGROUND INVESTIGATIONS

---Applicants for employment shall not be disqualified automatically based on an arrest or conviction record, a military discharge that is less than honorable, or a poor credit rating.
---In determining the effect of criminal conviction upon an applicant's qualifications the City can consider the following factors.
---(1) nature of the position
(2) nature of crime
(3) period of time lapsed since conviction
(4) success or failure of rehabilitation efforts

XI SUPERVISORY PERSONNEL

28. Supervisory personnel will be evaluated, in part, on the basis of their equal employment opportunity and affirmative action efforts and results, as well as their cooperation with the Affirmative Action Officer.

XII DISMISSALS FROM THE POLICE AND FIRE TRAINING ACADEMIES

29. Prior to dismissal notify any black or female in writing, allow them to respond within 10 days and keep all copies of correspondance for record.

XIV AFFIRMATIVE ACTION OFFICER

31. The City shall appoint:
(a) shall advise females and blacks of terms of this decree
(b) post office hours and locations
(c) recieve and investigate complaints, conciliate such complaints and establish written procedure notwithstanding any other provisions of law.
(d) maintain complete records
(e) review, prior to final selection, a department head's written justification for failure to select certified black or female applicants in jobs which blacks and females are underrepresented.

XV AFFIRMATIVE ACTION COMMITTEES

32. The City shall appoint separate Aff. Action Committees for Police, Fire, and Streets and Sanitation. Each Committee shall be composed of between three(3) to Five(5) members. Such Committees shall review job assignments and disciplinary policies to insure such policies are maintained and administered in a manner that does not discriminate due to race or sex. At least 2 blacks and 1 female will be among the members of this committee. Each committee member will be compensated at the same rate that the member recieves in his regular job. These will be City employees who may be either incumbents in their respective departments or individuals selected from outside.

EXHIBIT C

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

THE UNITED STATES OF AMERICA, et al,	)	
PLAINTIFFS	)	CIVIL ACTION NO.
VS.	)	75-P-0666-S
JEFFERSON COUNTY, and BEN L. ERDREICH, THOMAS W. GLOOR, CHRIS H. DOSS, COMMISSIONERS, ET AL,	)	
DEFENDANTS	)	

C A P T I O N

THE ABOVE ENTITLED CAUSE came on to be heard before the Honorable Sam C. Pointer, Jr., United States District Judge, in Courtroom No. 2 of the United States District Courthouse, Birmingham, Alabama, on the 3rd day of August, 1981, commencing at 9:00 A.M., at which time the following proceedings were had and done:

FEDERAL OFFICIAL REPORTERS
FEDERAL COURTHOUSE BUILDING
BIRMINGHAM, ALABAMA 35203
(205) 252-6565

THE RECORD NEVER FORGETS

A P P E A R A N C E S

Mr. Richard J. Ritter, and Mr. S. Theodore Merritt, United States Department of Justice, Civil Rights Division, Employment Section, Washington, D.C. 20530, appearing for the United States.

Ms. Caryl Privett, Assistant U. S. Attorney, United States District Courthouse, Birmingham, Alabama, also appearing for the United States.

Mr. Stephen L. Spitz, Lawyers Committee for Civil Rights under Law, Suite 520, 733 15th Street, N. W. Washington, D. C. 20005, appearing for the Martin Class.

Ms. Susan Reeves, Attorney at Law, 2027 First Avenue North, Suite 400, Birmingham, Alabama, appearing for the Martin Class.

Mr. James K. Baker, City Attorney, 600 City Hall, Birmingham, Alabama, appearing for the City of Birmingham.

Mr. Oscar W. Adams, III, Attorney at Law, 1600 2121 Building, Birmingham, Alabama, appearing for the Ensley Branch of the NAACP.

Mr. James P. Alexander, of the firm of Bradley, Arant, Rose & White, 1500 Brown-Marx Building, Birmingham, Alabama, also appearing for the City of Birmingham.

Mr. Henry L. Thompson, Attorney at Law, 500 South 22nd Street, Suite 214, Birmingham, Alabama 35233, appearing for the Objectors to the Consent Decree.

Mr. David P. Whiteside, of the firm of Johnston, Barton, Proctor, Swedlaw & Naff, 1212 Bank for Savings Building, Birmingham, Alabama, appearing for the Jefferson County Personnel Board.

Mr. Raymond P. Fitzpatrick, Jr., of the firm of Foster, Conwell & Bolton, 2015 Second Avenue North, Birmingham, Alabama, appearing for Jefferson County.

MR. ALEXANDER: What the City intends, and as is evident, there may be some area of disagreement among the co-defendants, is this: That it would request the Personnel Board to certify to it applicants with gender and racial preferences consistent with the goals we have stated. That's step one.

To the extent that the Personnel Board either fails or refuses to do that, then the City through its own personnel organization would recruit and seek women or blacks to meet a particular requirement. It would then send those persons to the Personnel Board and request that the Personnel Board certify them through the normal process.

THE COURT: Let me use this as an illustration: Suppose the City of Birmingham wanted two police officers, it would be unusual simply to be asking for two, but that would typically mean you would have what, five, four people certified to fill those two positions? You've got a goal for certification and for hiring of, what, fifty percent? Suppose the Personnel Board responds and gives you the names of two blacks and two whites; suppose the City finds that the two whites who were certified are demonstrably better qualified

than the two blacks who are certified, what is your view in terms of what the City can do under this decree?

MR. ALEXANDER: I think that the City would be required over a period of time to see to it that the racial goals were met. Assuming that the demonstrable qualifications were assessed by job-related standards that cause the plaintiffs no difficulty, and further assuming that the blacks were not minimally qualified in some view of the City, then we would take the whites. We would try to balance over a period of time to get that goal.

Assuming that both the whites and the blacks were both qualified, but assuming by some standard, and it's a little bit difficult for me to put it in a factual context, but some standard the whites were perceived to be better, if the blacks were perceived minimally qualified, and we required additional blacks to meet our goals, then we would take them.

THE COURT: Suppose the blacks certified from the Personnel Board declined appointment, you selected them, they declined appointment, you've still got on my hypothetical two whites who have been certified, can you then go outside the Board and in effect directly recruit a black?

MR. ALEXANDER: I think that we would take the position that we could recruit a black, but we would refer the black to the Personnel Board, then it would be incumbent upon the Personnel Board to determine whether the recruited black or blacks met the various criteria.

THE COURT: Do you view these paragraphs as in some way giving the City the right to conclude that those certified by the Board are not in fact qualified?

MR. ALEXANDER: No different than we do now, Your Honor. The answer is yes. We think that the Personnel Board and the City look at different criteria.

THE COURT: Well, you would not attempt to utilize the provisions of paragraph 10 to give you any powers with respect to rejection of Board-certified persons that you do not already have?

MR. ALEXANDER: Yes, sir.

THE COURT: That is, by treating them as not qualified?

MR. ALEXANDER: Yes, sir.

THE COURT: Okay.

MR. ALEXANDER: I would emphasize, Your Honor, and recognizing there is some controversy about

CITIZENS' COMMISSION ON
CIVIL★RIGHTS
2000 M Street, N.W. Washington, D.C. 20036
Suite 400 202 / 659-5565

March 14, 1990

The Honorable Edward M. Kennedy
Chairman, Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Dear Senator Kennedy:

On behalf of the Citizens' Commission on Civil Rights, we appreciate the opportunity to provide the committee with the views of the Commission regarding the Civil Rights Act of 1990.

The Citizens' Commission on Civil Rights is a bipartisan group of former officials who have served in the federal government in positions with responsibility for equal opportunity. It was established in 1982 to monitor the policies and practices of the federal government and to seek ways to accelerate progress in the area of civil rights. Members of the Commission include a former Attorney General; former Secretaries of the Department of Health, Education and Welfare, and the Department of Labor; a former Solicitor General; former Chairs of the Equal Employment Opportunity Commission; and former members of the U.S. Civil Rights Commission.

The members of the Commission have all been actively involved throughout their careers with efforts to reach the goal of equal opportunity for all Americans. That goal motivated the Congress to pass the Civil Rights Act of 1964, outlawing discrimination in employment, public accommodations, and federally funded programs. That act was critical not just for the legal changes it required, but also for the moral message it conveyed: discrimination and injustice would no longer be tolerated in our society.

In the twenty-five years since the passage of the 1964 act, the law and actions taken to implement it continued to enjoy the support of the American people, and of their elected representatives of both parties in both the House and Senate. In fact, for most of the past twenty-five years, the goal of equal opportunity has been a bipartisan one, starting with President Johnson's role in passing the 1964 act. But it was Chief Justice Warren Burger, appointed by President Nixon, who authored the key case interpreting that act to prohibit policies that deny opportunities to minorities even when the practices

were not intentionally discriminatory, Griggs v. Duke Power (1971). In passing the 1972 amendments to the Civil Rights Act, Congress effectively ratified the Griggs case, again with strong bipartisan support. Measure to strengthen civil rights protections in other areas, such as voting, housing, and education, have all moved forward as a result of the consensus of both parties that eliminating continuing discrimination was a national priority.

In interpreting those laws, the U.S. Supreme Court and the lower federal courts recognized that practices long operating to exclude or limit the opportunities of minorities, women, disabled people or older workers were often deeply entrenched and that substantial change in those practices was required to translate paper guarantees into actual equal opportunity. Accordingly, the laws were interpreted not in a formalistic or constricted fashion, but in a way that would give effect to their broad objective of bringing minorities and other intended beneficiaries into the economic mainstream.

In 1983, the Citizens' Commission received testimony from a number of corporate leaders indicating that the legal standards in place then were having the desired the effect of increasing workplace options for women and minorities. The corporations reported that changes in their hiring and promotion practices, which resulted in the inclusion of more women and minorities in their workforces, had also resulted in improvements in employee job satisfaction, overall labor-management relations, improved public relations, and increased public goodwill toward their companies. See Affirmative Action to Open the Doors of Job Opportunity, pp. 130-147 (report of the Citizens' Commission on Civil Rights, June 1984).

But, with changes in the membership of the Supreme Court, a majority of the Court has turned its back on the basic legal principles and precedents that brought about new opportunities for minorities and women in the workforce. In the short space of several weeks last June, the Court in a series of decisions changed course dramatically, relaxing the duties of employers, making it far more difficult for minorities and women to prove a violation of the civil rights laws, and even opening the way for employment discrimination settlement agreements to be attacked long after they have gone into effect.

As a result, the Congress is once again called upon to serve as the conscience of the American people. The Commission believes that the Civil Rights Act of 1990 properly restores and strengthens civil rights protections. The Commission endorses this legislation and urges the Congress to pass it promptly to avoid prolonging the uncertainty and injustice resulting from the Court's decisions.

In an effort to assess the initial impact from the Supreme Court decisions, the Commission recently undertook a survey in conjunction with the U.S. Conference of Mayors. As Mayor William Hudnut testified before your committee earlier this month, the survey demonstrated strong continuing support for affirmative action plans. For example, 93% of the 153 cities responding to the survey indicated that their affirmative action plans have had overall positive results. Moreover, even in the relatively short time since the Supreme Court decisions last June, a number of cities report that changes have been made or are anticipated in the operation of their affirmative action plans. For example, as a result of the Supreme Court decisions, 17 cities have already modified their plans. Ten cities expect to make changes in the future, and 12 have received a formal or informal request to reconsider hiring or employment practices. Nine cities report that legal action to challenge have already been filed. In addition, the Lawyers' Committee on Civil Rights reports that challenges have been brought in five other cities which did not respond to the survey.

We understand that after months of urging the Congress to wait and assess the impact of the decisions before acting on any bill, the Bush administration has now submitted its own bill. While we are pleased that the administration has made some effort to respond to the damaging decisions of the Court, its bill's failure to address the problems created by the decisions in Wards Cove v. Atonio, Martin v. Wilks, and Price Waterhouse v. Hopkins makes it an unacceptable alternative to the more comprehensive legislation which you have introduced.

Your committee has received testimony demonstrating the impact which the Court's decisions have had on victims of job discrimination. We believe that the Civil Rights Act of 1990 provides the appropriate framework for restoring the civil rights protections eliminated by the Supreme Court, and we urge swift passage of the legislation.

Yours truly,

Arthur Flemming
Chair

PREPARED STATEMENT OF THE WASHINGTON LEGAL FOUNDATION

MR. CHARIMAN, THANK YOU FOR INVITING ME HERE TODAY TO TESTIFY REGARDING A BILL BEFORE YOUR COMMITTEE (S. 2104) ENTITLED THE "CIVIL RIGHTS ACT OF 1990." I APPRECIATE THE OPPORTUNITY TO DO SO AND COMMEND THE COMMITTEE FOR PERMITTING INDIVIDUALS REPRESENTING A BROAD SPECTRUM OF THOUGHT TO APPEAR BEFORE THE COMMITTEE.

THE WASHINGTON LEGAL FOUNDATION (WLF), OF WHICH I AM CHIEF COUNSEL, IS A NATIONAL NONPROFIT PRO-FREE ENTERPRISE PUBLIC INTEREST LAW AND POLICY CENTER HEADQUARTERED IN WASHINGTON, D.C. WLF HAS OVER 120,000 MEMBERS, SUPPORTERS, AND CONTRIBUTORS NATIONWIDE. MY COMMENTS REFLECT EXCLUSIVELY THE INTERESTS OF OUR MEMBERS AND THE PUBLIC AS A WHOLE, NOT ANY ORGANIZATIONAL INTEREST OF WLF. WE ARE NOT LOBBYING FOR OR AGAINST THE PASSAGE OF THIS LEGISLATION, BUT RATHER ARE MERELY EXPRESSING OUR VIEWS AS TO THE POLICY CONSIDERATIONS FOR OUR LEGAL SYSTEM THAT THE COMMITTEE SHOULD KEEP IN MIND WHEN CONSIDERING AMENDMENTS TO OUR CIVIL RIGHTS LAWS.

WLF PARTICIPATES IN AND HAS DEVOTED A SUBSTANTIAL PORTION OF ITS RESOURCES TO CASES RELATING TO CONSTITUTIONAL LAW AND THE CIVIL RIGHTS OF INDIVIDUAL CITIZENS. WLF BELIEVES THAT NO INHERENT CONFLICT EXISTS BETWEEN THE RIGHTS OF

INDIVIDUALS TO UNIMPEDED PARTICIPATION IN THE FREE ENTERPRISE SYSTEM AND THE RIGHTS OF INDIVIDUALS NOT TO BE DISCRIMINATED AGAINST ON THE BASIS OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN. WLF BELIEVES THAT OUR CONSTITUTION AND CIVIL RIGHTS LAWS SHOULD NOT BE INTERPRETED IN A MANNER AS TO CREATE SUCH A CONFLICT. IN FURTHERANCE OF THAT OBJECTIVE, WLF APPEARED AS *AMICUS CURIAE* BEFORE THE U.S. SUPREME COURT IN THREE RECENT CIVIL RIGHTS CASES THAT HAVE ATTRACTED CONSIDERABLE ATTENTION BOTH WITHIN CONGRESS AND WITHIN THE PUBLIC AT LARGE: *METRO BROADCASTING, INC. v. FCC*, SUP. CT. NO. 89-453 (DEC. PENDING 1990); *CITY OF RICHMOND v. J.A. CROSON CO.*, 109 S.CT. 706 (1989); AND *PATTERSON v. McLEAN CREDIT UNION*, 109 S.CT. 2363 (1989). THE SUPREME COURT'S DECISION IN *PATTERSON* IS DIRECTLY ADDRESSED BY S. 2104.

IN A PERFECT WORLD, THERE WOULD BE MINIMAL LITIGATION AND NO UNLAWFUL DISCRIMINATION. LITIGATION SAPS OUR NATIONAL STRENGTH BY DIVERTING RESOURCES AWAY FROM MORE PRODUCTIVE ENDEAVORS. UNLAWFUL DISCRIMINATION VIOLATES INDIVIDUALS' RIGHTS TO DIGNITY AND PREVENTS INDIVIDUALS FROM ATTAINING POSITIONS FROM WHICH THEY COULD USE THEIR TALENTS FOR THE BENEFIT OF SOCIETY AS A WHOLE.

27-755 0 - 90 - 26

UNFORTUNATELY, WE LIVE IN A SOCIETY IN WHICH UNLAWFUL DISCRIMINATION STILL EXISTS AND IN WHICH LITIGATION HAS BECOME THE NATIONAL PASTTIME. THE TWO ISSUES ARE CLOSELY RELATED. WE MUST RECOGNIZE THAT EVERY TIME WE CREATE A NEW CAUSE OF ACTION IN ORDER TO COMBAT UNLAWFUL DISCRIMINATION, WE WILL INCREASE THE QUANTITY OF CIVIL RIGHTS LITIGATION IN OUR COURTS, A HEALTHY PERCENTAGE OF WHICH WILL BE FRIVOLOUS. CONVERSELY, IF ALL LAWS PROVIDING REMEDIES FOR THE VICTIMS OF UNLAWFUL DISCRIMINATION WERE ELIMINATED, THERE IS LITTLE DOUBT THAT THE INCIDENCE OF UNLAWFUL DISCRIMINATION WOULD INCREASE.

THE ISSUE BEFORE THE COMMITTEE IS WHAT IS THE PROPER BALANCE TO BE STRUCK BETWEEN REDUCING UNLAWFUL DISCRIMINATION ON THE ONE HAND AND CONTROLLING THE LITIGATION EXPLOSION ON THE OTHER. WLF SUBMITS THAT THE PROPER BALANCE WAS STRUCK IN THE CIVIL RIGHTS ACT OF 1964. CERTAIN PROVISIONS OF S. 2104 ARE LIKELY TO UPSET THAT BALANCE BY GREATLY INCREASING THE QUANTITY OF CIVIL RIGHTS LITIGATION IN OUR COURTS WHILE DOING LITTLE TO ROOT OUT UNLAWFUL DISCRIMINATION IN OUR SOCIETY.

WLF WISHES TO FOCUS ITS ATTENTION ON THREE SECTIONS OF S. 2104: SECTIONS 12, 4, AND 8. SECTION 12 WOULD OVERRULE THE

SUPREME COURT'S *PATTERSON* DECISION BY AMENDING 42 U.S.C. § 1981 TO PROVIDE THAT THE RIGHT TO "MAKE AND ENFORCE CONTRACTS" GUARANTEED BY § 1981 INCLUDES THE MAKING, PERFORMANCE, MODIFICATION, AND TERMINATION OF SUCH CONTRACTS. SECTION 4 WOULD OVERRULE THE SUPREME COURT'S DECISION IN *WARDS COVE PACKING CO. v. ATONIO*, 109 S.CT. 2115 (1989), BY AMENDING TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 TO PROVIDE THAT ONCE A CIVIL RIGHTS PLAINTIFF HAS SHOWN THAT AN EMPLOYMENT PRACTICE OR A GROUP OF EMPLOYMENT PRACTICES HAS A DISPROPORTIONATE IMPACT ON THE BASIS OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN, THE PRACTICE OR PRACTICES ARE UNLAWFUL UNLESS THE EMPLOYER CAN SHOW THAT THE PRACTICE IS "REQUIRED BY BUSINESS NECESSITY." SECTION 8 WOULD AMEND TITLE VII TO PERMIT JURY TRIALS AND AWARDS OF COMPENSATORY AND PUNITIVE DAMAGES IN EMPLOYMENT DISCRIMINATION SUITS BROUGHT UNDER TITLE VII. WLF BELIEVES THAT ADOPTION OF THESE THREE PROPOSED SECTIONS WOULD GREATLY INCREASE LITIGATION IN OUR COURTS AND AT THE SAME TIME WOULD DO NOTHING TO DECREASE DISCRIMINATION IN OUR SOCIETY ON THE BASIS OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN. TO THE CONTRARY, ADOPTION OF SECTION 4 MOST LIKELY WOULD LEAD TO AN INCREASE IN SUCH DISCRIMINATION.

SECTION 12

CONGRESS ADOPTED TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 IN ORDER TO PROVIDE A REMEDY AGAINST UNLAWFUL DISCRIMINATION IN THE WORKPLACE. HOWEVER, CONGRESS PLACED CERTAIN PROCEDURAL CONTROLS ON SUCH REMEDIES BECAUSE IT WISHED TO ENCOURAGE MEDIATION BETWEEN EMPLOYEES AND EMPLOYERS RATHER THAN CONFRONTATION, AND BECAUSE IT DID NOT WISH TO SUBJECT TO SUIT EVERY EMPLOYER WITH AN EMPLOYEE WHO DID NOT BELIEVE THAT HE OR SHE HAD BEEN TREATED FAIRLY. THE PRINCIPAL PROCEDURAL CONTROL WAS A REQUIREMENT THAT THE EMPLOYEE FIRST BRING HIS OR HER COMPLAINT TO A STATE OR FEDERAL AGENCY FOR INVESTIGATION AND MEDIATION; ONLY AFTER THE INVESTIGATION WAS COMPLETE AND MEDIATION EFFORTS HAD FAILED COULD THE EMPLOYEE FILE SUIT IN FEDERAL COURT.

THAT CAREFUL BALANCE BETWEEN MEDIATION AND VINDICATION OF RIGHTS WAS UPSET TO A DEGREE BY A 1976 SUPREME COURT DECISION, *RUNYON v. McCRARY*, 427 U.S. 160 (1976). IN *RUNYON*, THE HIGH COURT HELD FOR THE FIRST TIME THAT 42 U.S.C. § 1981, A CIVIL RIGHTS STATUTE THAT HAD BEEN ON THE BOOKS FOR MORE THAN A CENTURY, PROHIBITED RACIAL DISCRIMINATION IN THE MAKING OF *PRIVATE* CONTRACTS (INCLUDING EMPLOYMENT CONTRACTS). MOST (INCLUDING CONGRESS WHEN IT ADOPTED TITLE

VII) HAD PREVIOUSLY ASSUMED THAT § 1981 APPLIED ONLY TO STATE AND LOCAL GOVERNMENTS. THE *RUNYON* DECISION MEANT THAT, FOR THE FIRST TIME, A PLAINTIFF ALLEGING RACIAL DISCRIMINATION IN THE HIRING PROCESS COULD TAKE HIS CASE DIRECTLY TO FEDERAL COURT UNDER § 1981 WITHOUT BEING REQUIRED FIRST TO GO THROUGH THE MEDIATION PROCEDURES REQUIRED BY TITLE VII.

THE SUPREME COURT EVIDENTLY WAS CONCERNED THAT ITS *RUNYON* DECISION WAS PERMMITTING PLAINTIFFS TO MAKE AN END RUN AROUND THE MEDIATION PROCEDURES PRESCRIBED BY TITLE VII. THUS, IN *PATTERSON v. McLEAN CREDIT UNION*, 109 S.CT. 2363 (1989), THE SUPREME COURT -- WHILE AFFIRMING *RUNYON* -- REFUSED TO EXPAND ITS HOLDING INTO NEW AREAS. THE COURT HELD THAT § 1981 PROHIBITED RACIAL DISCRIMINATION BY PRIVATE CITIZENS IN THE *MAKING* OF EMPLOYMENT CONTRACTS AND OTHER TYPES OF CONTRACTS BUT NOT IN THE PERFORMANCE, MODIFICATION, AND TERMINATION OF CONTRACTS. THUS, THE COURT HELD, § 1981 DID NOT PROHIBIT ON-THE-JOB RACIAL HARASSMENT; PLAINTIFFS MAKING SUCH CLAIMS SHOULD SUE UNDER TITLE VII AFTER GOING THROUGH THE MEDIATION REQUIREMENTS OF THAT LAW. ANY OTHER DECISION, THE COURT SAID, WOULD RENDER TITLE VII'S MEDIATION REQUIREMENTS A NULLITY.

SECTION 12 OF S. 2104 WOULD OVERTURN *PATTERSON* BY EXPANDING § 1981 TO INCLUDE PROHIBITIONS AGAINST RACIAL DISCRIMINATION IN THE PERFORMANCE, MODIFICATION, AND TERMINATION OF CONTRACTS AS WELL AS IN THE MAKING OF CONTRACTS. BUT THE BILL'S EXPLANATION FOR THIS CHANGE IS WHOLLY ILLOGICAL. THE BILL'S SUPPORTERS DO NOT DENY THAT TITLE VII ALREADY PROVIDES PROTECTION AGAINST RACIAL DISCRIMINATION (AS WELL AS OTHER TYPES OF UNLAWFUL DISCRIMINATION) IN THE PERFORMANCE, MODIFICATION, AND TERMINATION OF EMPLOYMENT CONTRACTS. HOWEVER, THEY INSIST THAT § 1981 MUST BE EXPANDED BECAUSE TITLE VII DOES NOT APPLY TO EMPLOYERS WITH LESS THAN 15 EMPLOYEES. WLF TAKES NO POSITION REGARDING WHETHER FEDERAL CIVIL RIGHTS LAWS SHOULD APPLY TO VERY SMALL BUSINESSES.[1] BUT IF CONGRESS IS DETERMINED TO EXPAND THE SCOPE OF THE FEDERAL CIVIL RIGHTS LAWS TO COVER BUSINESSES WITH LESS THAN 15 EMPLOYEES, THE MOST LOGICAL METHOD FOR DOING SO IS TO AMEND TITLE VII, NOT TO EXPAND THE COVERAGE OF § 1981.

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[1] Congress in 1964 exempted employers with less than 15 employees from the coverage of Title VII out of a concern that its power to regulate local activities under the Commerce Clause of the Constitution did not and should not extend to businesses that were so small that they were unlikely to have any effect on interstate commerce. There is much to be said in support of a policy that leaves to the States the regulation of very small businesses, including regulation in the field of civil rights.

THE PROPOSED EXPANSION OF § 1981 WOULD BE BOTH UNDERINCLUSIVE AND OVERINCLUSIVE. IT WOULD BE UNDERINCLUSIVE BECAUSE § 1981 APPLIES ONLY TO *RACIAL* DISCRIMINATION; THUS, VICTIMS OF DISCRIMINATION ON THE BASIS OF COLOR, RELIGION, SEX, OR NATIONAL ORIGIN WHO WORK FOR VERY SMALL COMPANIES WOULD STILL BE WITHOUT A FEDERAL REMEDY. IT WOULD BE OVERINCLUSIVE BECAUSE THE PROBLEM IDENTIFIED BY THE SUPREME COURT IN *PATTERSON* -- THE SIGNIFICANT OVERLAP BETWEEN TITLE VII AND § 1981 -- WOULD MERELY BE COMPOUNDED. AMENDING TITLE VII TO INCLUDE COVERAGE FOR EMPLOYERS WITH LESS THAN 15 EMPLOYEES WOULD ACCOMPLISH THE GOAL OF SECTION 12 AS LISTED IN THE SUMMARY OF S. 2104 BUT WOULD AVOID THE OVERINCLUSIVE/UNDERINCLUSIVE DEFICIENCIES OF SECTION 12.

NOR DOES THE *PATTERSON* DECISION CREATE ANY OTHER "GAPS" IN THE FEDERAL CIVIL RIGHTS LAWS, AS ALLEGED BY SUPPORTERS OF S. 2104, SUCH AS THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. (THE "LEGAL DEFENSE FUND"). THE LEGAL DEFENSE FUND RECENTLY RELEASED A WIDELY CIRCULATED STUDY OF RECENT LOWER FEDERAL COURT DECISIONS PURPORTING TO SHOW THAT *PATTERSON* HAS LEFT MANY VICTIMS OF RACIAL DISCRIMINATION WITHOUT ANY EFFECTIVE MEANS OF REDRESS. TO SUPPORT THAT

ARGUMENT, THE LEGAL DEFENSE FUND POINTED TO A GRAND TOTAL OF EIGHT CASES IN WHICH THE DISMISSAL OF A § 1981 CLAIM PURSUANT TO *PATTERSON* PURPORTEDLY LEFT THE PLAINTIFF WITHOUT AN EFFECTIVE REMEDY. WLF CONDUCTED ITS OWN STUDY OF THOSE CASES AND DISCOVERED THAT THE LEGAL DEFENSE FUND HAD SIGNIFICANTLY MISREPRESENTED THE HOLDINGS OF THOSE CASES. IN *EVERY ONE* OF THOSE EIGHT CASES THE PLAINTIFF STILL HAD AN EFFECTIVE REMEDY FOR THE ALLEGED DISCRIMINATION EVEN AFTER THE DISMISSAL OF HIS § 1981 CLAIM. A COPY OF WLF'S STUDY IS ATTACHED TO WLF'S WRITTEN TESTIMONY. IF THERE ARE ANY GAPS IN FEDERAL CIVIL RIGHTS LAW CREATED BY THE *PATTERSON* DECISION, SUPPORTERS OF S. 2104 HAVE FAILED TO IDENTIFY THOSE GAPS.

S. 2104's ATTEMPT TO OVERRULE *PATTERSON* IS A MISGUIDED EFFORT THAT WILL PROMOTE CONFRONTATION OVER MEDIATION. IF SECTION 12 OF S. 2104 IS ADOPTED, THOSE ALLEGING RACIAL DISCRIMINATION IN THE WORKPLACE WILL BE PERMITTED TO BYPASS COMPLETELY THE MEDIATION PROCEDURES ESTABLISHED BY TITLE VII AND TO MARCH DIRECTLY TO FEDERAL COURT. FEDERAL COURT DOCKETS ALREADY ARE CONGESTED WITH RACIAL DISCRIMINATION CLAIMS; SECTION 12, IF ADOPTED, WILL COMPOUND THAT CONGESTION PROBLEM. WLF BELIEVES THAT RACIAL DISCRIMINATION IN THE

WORKPLACE CAN MOST READILY BE ELIMINATED WITH THE LEAST COST TO EMPLOYEES, EMPLOYERS, AND SOCIETY AS A WHOLE IF EMPLOYEES ARE ENCOURAGED TO MEDIATE THEIR DISCRIMINATION CLAIMS BEFORE FILING SUIT. THE MEDIATION PROCESS CURRENTLY IN FORCE UNDER TITLE VII IS FAR BETTER SUITED TO SOLVING THE PROBLEM OF WORKPLACE DISCRIMINATION THAN IS THE PROCESS OF CONFRONTATION ENCOURAGED BY THE PROPOSED SECTION 12.

SECTION 4

THE PROPOSED SECTION 4 OF S. 2104 WOULD CREATE A NEW CAUSE OF ACTION UNDER TITLE VII. SECTION 4 STATES THAT A PLAINTIFF CAN DEMONSTRATE AN "UNLAWFUL EMPLOYMENT PRACTICE" BY DEMONSTRATING THAT ANY GROUP OF EMPLOYMENT PRACTICES ENGAGED IN BY AN EMPLOYER HAS A DISPARATE IMPACT ON THE BASIS OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN; THE EMPLOYER COULD THEN REBUT THE FINDING OF UNLAWFULNESS BY SHOWING THAT EACH OF THE EMPLOYMENT PRACTICES IS "REQUIRED BY BUSINESS NECESSITY."

SECTION 4, IF ADOPTED, WOULD BE A TREMENDOUS SETBACK TO THE CAUSE OF EQUAL RIGHTS UNDER THE LAW. IT WOULD AMOUNT TO A VIRTUAL MANDATE FOR THE ESTABLISHMENT OF RACIAL, SEX, AND RELIGIOUS QUOTAS BY ALL PRIVATE EMPLOYERS.

SUPPORTERS OF SECTION 4 ALLEGE THAT THE NEW PROVISION IS NOTHING MORE THAN A RETURN TO THE LAW THAT EXISTED PRIOR TO THE SUPREME COURT'S DECISION IN *WARDS COVE PACKING CO. v. ATONIO*, 109 S.CT. 2115 (1989). IN *WARDS COVE*, THE COURT HELD THAT IN ORDER FOR A PLAINTIFF IN A DISPARATE IMPACT TITLE VII CASE TO PREVAIL, HE MUST IDENTIFY A PARTICULAR EMPLOYMENT PRACTICE THAT IS HAVING A DISPROPORTIONATE IMPACT ON THE BASIS OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN. IF THE PLAINTIFF DOES SO, *WARDS COVE* HELD THAT THE BURDEN IS THEN ON THE EMPLOYER TO COME FORWARD WITH SOME BUSINESS JUSTIFICATION FOR THE CHALLENGED PRACTICE; IF THE EMPLOYER DOES SO, THE BURDEN OF PERSUASION IS ON THE PLAINTIFF TO DEMONSTRATE THAT THE ALLEGED BUSINESS JUSTIFICATION IS PRETEXTUAL OR INSUBSTANTIAL.

THE *WARDS COVE* RULING IS NOT A BREAK WITH PAST SUPREME COURT PRECEDENT; IT IS CONSISTENT WITH A LONG LINE OF SUPREME COURT CASES HOLDING THAT THE BURDEN OF PERSUASION IS ON THE PLAINTIFF AT ALL TIMES IN AN EMPLOYMENT DISCRIMINATION CASE.[2]

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[2] To support their argument that *Wards Cove* is a break with Court precedent, supporters of § 4 point to *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). That argument is without merit. *Griggs* made clear (as did *Wards Cove*) that a plaintiff attempting to show disparate impact may not simply point to the composition of the employer's work force but rather must identify a particular employment practice that is having the alleged disparate impact. Once a plaintiff makes such a showing, *Griggs* is unclear who (between the plaintiff and the employer) bears the burden of persuasion -- as distinguished from the

(continued...)

TO THE CONTRARY, IT IS THE PROPOSED LEGISLATION THAT REPRESENTS A CLEAR BREAK FROM ESTABLISHED CIVIL RIGHTS LAW IN THIS COUNTRY.

THE PROPOSED REVISION OF TITLE VII IS BASED ON A FALLACIOUS PREMISE: THAT IN THE ABSENCE OF UNLAWFUL DISCRIMINATION, MEMBERS OF VARIOUS RACIAL, ETHNIC, AND RELIGIOUS GROUPS WOULD BE REPRESENTED WITHIN EVERY JOB CATEGORY IN THIS COUNTRY IN PRECISE PROPORTION TO THEIR REPRESENTATION WITHIN THE POPULATION AS A WHOLE. SUPPORTERS OF THE PROPOSED REVISION JUMP FROM THAT FALLACIOUS PREMISE TO THE CONCLUSION THAT ANY DISPARITY BETWEEN A GROUP'S REPRESENTATION IN THE POPULATION AS A WHOLE AND ITS REPRESENTATION IN A PARTICULAR JOB CATEGORY MUST BE THE RESULT OF INVIDIOUS DISCRIMINATION. SCHOLARS SUCH AS THOMAS SOWELL HAVE CONVINCINGLY DEMONSTRATED THAT THROUGHOUT HISTORY MEMBERS OF PARTICULAR RACIAL, ETHNIC, AND RELIGIOUS GROUPS HAVE EXCELLED IN PARTICULAR LINES OF ENDEAVOR IN

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[3](...continued)
burden of production -- on the issue of business justification for the challenged business practice. *Wards Cove* answered that question by making clear that the plantiff bears the burden of persuasion on that issue once the employer meets his burden of production. Nothing in *Wards Cove* is inconsistent with the Court's ruling in *Griggs*; indeed, the Supreme Court in *Wards Cove* explicitly reaffirmed the *Griggs* decision. Justice White, who joined the Court's unanimous decision in Griggs, voted with the majority in Wards Cove.

NUMBERS HIGHLY DISPROPORTIONATE TO THEIR NUMBERS WITHIN THEIR SOCIETIES; THEIR SUCCESS IS BASED ON FACTORS INDIGENOUS TO THEIR CULTURAL UPBRINGING AND IS OFTEN ACHIEVED IN THE FACE OF DISCRIMINATION AGAINST THEM BY THE MAJORITY GROUPS WITHIN THEIR SOCIETIES. ACCORDINGLY, THERE IS SIMPLY NO EMPIRICAL BASIS FOR CONCLUDING, AS DO SUPPORTERS OF SECTION 4, THAT MOST OR EVEN MANY EMPLOYMENT PRACTICES WHICH HAVE DISPARATE IMPACT ON THE BASIS OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN ARE INHERENTLY UNFAIR OR HAVE THEIR ORIGINS IN INTENTIONAL INVIDIOUS DISCRIMINATION. IN THE ABSENCE OF SUCH A CONCLUSION, THERE CAN BE NO RATIONAL JUSTIFICATION FOR THE PROPOSED AMENDMENT TO TITLE VII.

PROPOSED SECTION 4 IS PROCEDURALLY FLAWED AS WELL. IT PERMITS A PLAINTIFF IN A DISPARATE IMPACT CASE TO PREVAIL WITHOUT IDENTIFYING ANY EMPLOYMENT PRACTICE ALLEGED TO HAVE A DISPARATE IMPACT. RATHER, THE PLAINTIFF CAN PREVAIL BY POINTING TO THE BUNDLE OF EMPLOYMENT PRACTICES UTILIZED BY THE EMPLOYER AND DEMONSTRATING THAT THOSE PRACTICES AS A GROUP CAN HAVE A DISPARATE IMPACT ON THE BASIS OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN. SINCE EVERY EMPLOYER UTILIZES A WIDE ARRAY OF PRACTICES IN MAKING HIRING, PROMOTION, AND DISCHARGE DECISIONS, ANY PLAINTIFF ABLE TO

DEMONSTRATE THAT HIS OR HER PARTICULAR GROUP IS "UNDER-REPRESENTED" IN THE EMPLOYER'S WORKFORCE WOULD BE ABLE TO MEET THAT TEST. BY PERMITTING PLAINTIFFS TO PREVAIL WITHOUT IDENTIFYING ANY SINGLE DISCRIMINATORY EMPLOYMENT PRACTICE, SECTION 4 GOES FAR BEYOND ANYTHING ENVISIONED BY THE *GRIGGS* DECISION OR OTHER CIVIL RIGHTS DECISIONS OF THE PAST.

SECTION 4 ALSO IS PROCEDURALLY FLAWED IN THAT IT ESTABLISHES AN IMPOSSIBLY HIGH STANDARD FOR EMPLOYERS ATTEMPTING TO JUSTIFY EMPLOYMENT PRACTICES WHICH LEAD TO "UNDER-REPRESENTATION" OF IDENTIFIABLE GROUPS WITHIN THEIR WORKFORCES. SECTION 4 STATES THAT SUCH EMPLOYMENT PRACTICES ARE PERMISSIBLE ONLY WHEN JUSTIFIED BY A "BUSINESS NECESSITY," DEFINED BY S. 2104 TO MEAN "ESSENTIAL TO EFFECTIVE JOB PREFORMANCE." THERE ARE FEW IF ANY EMPLOYMENT PRACTICES THAT COULD MEET THAT EXACTING STANDARD, A STANDARD FAR MORE STRINGENT THAN THAT APPLIED IN ANY PAST COURT DECISION. WHILE MOST EMPLOYMENT PRACTICES ARE ADOPTED BECAUSE EMPLOYERS HAVE REASON TO BELIEVE THAT THEY WILL LEAD TO MORE EFFICIENT OPERATION OF THEIR BUSINESSES, IT IS UNLIKELY THAT MANY BUSINESSES WOULD LOSE ALL ABILITY TO FUNCTION EFFECTIVELY IF THOSE EMPLOYMENT

PRACTICES WERE ABANDONED. THUS, MOST EMPLOYMENT PRACTICES WOULD FLUNK THE "BUSINESS NECESSITY" TEST.

EMPLOYER-IMPOSED QUOTAS WOULD BE THE INEVITABLE RESULT OF ADOPTION OF SECTION 4. BY CONSCIOUSLY ENSURING THAT ALL RACIAL, ETHNIC, AND RELIGIOUS GROUPS AND BOTH SEXES ARE REPRESENTED IN ITS WORKFORCE IN PROPORTION TO THEIR REPRESENTATION IN THE POPULATION AS A WHOLE, AN EMPLOYER WOULD ELIMINATE ALL DISPARATE IMPACT CLAIMS. EMPLOYERS ARE VIRTUALLY REQUIRED BY SECTION 4 TO TAKE SUCH ACTION, BECAUSE SECTION 4 MAKES IT VIRTUALLY IMPOSSIBLE FOR AN EMPLOYER TO JUSTIFY HIS FAILURE TO DO SO.

IT HAS LONG BEEN THE GOAL OF THE CIVIL RIGHTS MOVEMENT WITHIN THIS COUNTRY THAT EVENTUALLY ALL EMPLOYMENT DECISIONS WOULD BE MADE WITHOUT REGARD TO THE RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN OF THE EMPLOYEE. SECTION 4 REPRESENTS A GIANT STEP BACKWARD IN THAT STRUGGLE. AN EMPLOYER WOULD BE REQUIRED TO TAKE INTO ACCOUNT THOSE CHARACTERISTICS OF ITS EMPLOYEES WHENEVER IT MAKES AN EMPLOYMENT DECISION. WLF BELIEVES THAT IF ADOPTED, SECTION 4 WOULD LEAVE THIS COUNTRY SIGNIFICANTLY FURTHER AWAY FROM THE GOAL OF A TRULY COLOR-BLIND SOCIETY AND -- BY MANDATING USE OF RACE-BASED EMPLOYMENT DECISIONS -- MIGHT WELL VIOLATE

THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE.

SECTION 8

IN BALANCING THE NEEDS OF EMPLOYEES AND EMPLOYERS, TITLE VII MADE SOME REMEDIES AVAILABLE TO PLAINTIFFS BUT DENIED THEM OTHERS. THUS, AN EMPLOYEE WHO ESTABLISHES A VIOLATION OF TITLE VII IS GENERALLY ENTITLED TO AN INJUNCTION AGAINST FUTURE VIOLATIONS PLUS REIMBURSEMENT FOR ANY OUT-OF POCKET LOSSES (SUCH AS BACK PAY) ATTRIBUTABLE TO THE VIOLATION. SIGNIFICANTLY, PREVAILING TITLE VII PLAINTIFFS ARE ENTITLED TO REIMBURSEMENT OF ALL ATTORNEY FEES AND OTHER COSTS INCURRED IN BRINGING SUIT -- A PRIVILEGE DENIED TO LITIGANTS IN VIRTUALLY ALL OTHER TYPES OF LAWSUITS. HOWEVER, TITLE VII PLAINTIFFS MAY NOT RECOVER PUNITIVE DAMAGES OR OTHER TYPES OF COMPENSATORY DAMAGES (SUCH AS DAMAGES FOR EMOTIONAL DISTRESS).

SECTION 8 OF S. 2104 ATTEMPTS TO CHANGE THE BALANCE BETWEEN EMPLOYEES AND EMPLOYERS SO CAREFULLY ESTABLISHED BY TITLE VII. SECTION 8 WOULD PERMIT PREVAILING PLAINTIFFS IN TITLE VII CASES TO RECOVER PUNITIVE DAMAGES AND AN UNLIMITED ARRAY OF COMPENSATORY DAMAGES.

THE PROPOSED CHANGES UNDOUBTEDLY WOULD LEAD TO THE FILING OF MORE TITLE VII CLAIMS, BUT WLF DOES NOT BELIEVE THAT ANY SALUTORY PURPOSE WOULD BE SERVED BY THE CHANGES. EMPLOYEES WITH MERITORIOUS TITLE VII CLAIMS ALREADY HAVE SUFFICIENT INCENTIVES FOR BRINGING SUIT. ANY ATTORNEY FEES AND OTHER COSTS INCURRED IN BRINGING SUIT ARE FULLY RECOVERABLE. AS A RESULT, PLAINTIFFS LAWYERS READILY AGREE TO TAKE ON TITLE VII CASES ON A CONTINGENCY FEE BASIS IF THEY BELIEVE THAT THE CASE HAS A REASONABLE CHANCE OF SUCCESS. EVEN IF THE PLAINTIFF HAS NOT SUFFERED ANY OUT-OF-POCKET LOSSES AS A RESULT OF THE ALLEGED TITLE VII VIOLATION, THE PLAINTIFF HAS INCENTIVE TO FILE SUIT TO OBTAIN AN ORDER TO ENJOIN FU[illegible] VIOLATIONS.

SUPPORTERS OF SECTION 8 CITE ON-THE-JOB SEXUAL OR RACIAL HARASSMENT CLAIMS AS EVIDENCE OF THE NEED FOR PERMITTING RECOVERY OF PUNITIVE DAMAGES AND NON-ECONMIC COMPENSATORY DAMGES. WLF DOES NOT BELIEVE THAT PERMITTING RECOVERY OF SUCH DAMAGES WILL DO ANYTHING TO LESSEN THE INCIDENCE OF DISCRIMINATORY JOB HARASSMENT. GIVEN THE HIGH LITIGATION COSTS ALREADY BEING INCURRED BY EMPLOYERS IN DEFENDING AGAINST SUCH CLAIMS, EMPLOYERS ALREADY HAVE EVERY INCENTIVE THEY NEED TO TAKE STRONG MEASURES TO

ENSURE THAT HARASSMENT ON THE BASIS OF RACE, COLOR, RELIGION, SEX, AND NATIONAL ORIGIN ARE ELIMINATED FROM THE WORKPLACE. MOREOVER, WHEN INCIDENTS OF SUCH HARASSMENT DO ARISE, WLF BELIEVES THEY ARE BEST DEALT WITH BY MEDIATION TO ENSURE THAT THE INCIDENTS ARE NOT REPEATED. MEDIATION IS THE PREFERRED PROCEDURE UNDER TITLE VII. S. 2104, BY PERMITTING AWARDS OF PUNITIVE AND EMOTIONAL DISTRESS DAMAGES, MAY SUCCEED IN LINING THE POCKETS OF PLAINTIFFS' ATTORNEYS, BUT IT IS UNLIKELY TO DO ANYTHING TO REDUCE THE LEVEL OF ON-THE-JOB SEXUAL OR RACIAL HARASSMENT.

IN CLOSING, ONCE AGAIN I WISH TO THANK THE CHAIRMAN FOR THE OPPORTUNITY TO PRESENT THE VIEWS OF THE WASHINGTON LEGAL FOUNDATION TO THE COMMITTEE. WLF EXPRESSES NO VIEW REGARDING WHETHER S. 2104 SHOULD OR SHOULD NOT BE ADOPTED. NONETHELESS, WLF HOPES THAT THE VIEWS WE HAVE EXPRESSED HERE TODAY WILL BE OF ASSISTANCE TO THE COMMITTEE IN APPROVING WHATEVER LEGISLATION THE COMMITTEE BELIEVES MAY BE APPROPRIATE IN THE FIELD OF CIVIL RIGHTS.

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LEGAL DEFENSE FUND'S STUDY ON POST-*PATTERSON* CASE LAW IS FLAWED

By

Richard A. Samp

There is much less than meets the eye to a recent report issued by the NAACP Legal Defense and Educational Fund, Inc. (the "Legal Defense Fund") regarding the impact of *Patterson v. McLean Credit Union* on civil rights lawsuits brought in federal courts. *Patterson*, you may recall, was a June 1989 Supreme Court decision holding that a Reconstruction-era civil rights law, 42 U.S.C. § 1981, does not prohibit on-the-job racial harassment. *Patterson* also held that Title VII of the Civil Rights Act of 1964 *does* prohibit such harassment.

The Legal Defense Fund's study concludes that lower federal courts have reacted to *Patterson* by conducting wholesale dismissal of § 1981 claims in civil rights cases and that victims of racial discrimination in many instances are being left without any effective means of redress. The study, written by Legal Defense Fund Assistant Counsel Eric Schnapper, includes a thinly veiled plea to Congress to overrule *Patterson* by expanding § 1981 to cover all forms of racial discrimination in the private sector. Some members of Congress appear to be heeding that plea: Senator Edward Kennedy has filed legislation to overturn *Patterson* and has cited the Legal Defense Fund study as demonstrating why his legislation is needed. Hearings on Senator Kennedy's legislation are scheduled to begin later this month.

The Washington Legal Foundation (WLF) has undertaken a review of the post-*Patterson* court decisions that formed the basis of the Legal Defense Fund's study. WLF's review indicates that those cases do not support the Legal Defense Fund's contention that victims of racial discrimination are being denied redress. Indeed, the review indicates that the Legal Defense Fund misrepresented the holdings of a number of the cases in its study; in every instance of misrepresentation, the actual holding was more favorable to the civil rights plaintiff than was reported in the study.

The Legal Defense Fund's study examined 96 § 1981 claims that were dismissed by federal courts between June 15 and November 1, 1989. The study contends that in a "significant number" of cases the effect of those dismissals was to leave victims of racial discrimination without redress. That contention apparently is based on the study's claim that in a grand total of *eight* of the cases examined, the civil rights plaintiffs were not free to seek redress under Title VII, which prohibits discrimination on the basis of race "against any individual with respect to his compensation, terms, conditions, or privileges of employment." WLF reviewed those eight cases and discovered that, contrary to the Legal Defense Fund's representation, the plaintiff in each of those cases had an effective means of redressing the alleged discrimination. Those eight cases are as follows:

- *Ragin v. Steiner, Clateman and Associates, Inc.*, 714 F. Supp. 709 (S.D.N.Y. 1989). Suit by the NAACP and others against advertising agency, alleging racial discrimination by running newspaper advertisements for housing that featured only white models or no models at all. Legal Defense Fund study states that § 1981 was "[t]he only federal statute which arguably forbad the alleged discrimination," and that the § 1981 claim was dismissed "because of *Patterson*." In fact, the judge found that the plaintiffs *had* stated a federal cause of action under Title VIII, the Fair Housing Act. Moreover, the judge did not dismiss the plaintiffs' § 1981 claim "because of *Patterson*"; rather, the judge agreed with the plaintiffs that *Patterson* "may well" be distinguishable but nonetheless held on the basis of pre-existing § 1981 case law that the plaintiffs had failed to state a cause of action under § 1981.

- *Guerra v. Tishman East Realty*, 1989 U.S. Dist. LEXIS 6744 (S.D.N.Y. 1989). On-the-job racial harassment claim brought against building owner by employee of one of the building owner's independent contractors. Legal Defense Fund study classifies *Guerra* as a case involving "employment discrimination claims which, for a variety of reasons, were not or could not be remedied under Title VII." The study has misrepresented the holding in *Guerra*. In fact, the plaintiff brought a Title VII claim against the building owner, and the court *denied* the building owner's motion to dismiss the Title VII claim for failure to state a cause of action.

- *Washington v. Lake County, Illinois*, 717 F. Supp. 1310 (N.D. Ill. 1989). Suit by former employee alleging on-the-job racial harassment and racially discriminatory reprimands and discharge, brought against employer and supervisor. Legal Defense Fund study classifies *Washington* in same category as *Guerra*: a case involving "employment discrimination claims which, for a variety of reasons, were not actionable or could not be remedied under Title VII." The study has misrepresented the holding in *Washington*. In fact, the plaintiff brought a Title VII claim against his employer, and that claim was not challenged in the defendants' motion to dismiss. Moreover, although the report

[illegible] notes that the court dismissed the Title VII claim against the [illegible] (on the unobjectionable ground that Title VII runs against employers only, not against supervisors), the report fails to note that the court left intact the plaintiff's § 1983 claim against the supervisor (alleging racial discrimination under color of state law).

- [illegible] v. *Coca-Cola Bottling Co. of Mid America*, 1989 U.S. Dist. LEXIS [illegible] (D. Kan. 1989). Suit by current employee against employer, alleging on-the-job racial harassment by co-workers and supervisors. Legal Defense Fund study places *Mason* in same category with *Washington* and *Guerra* and states that district court "dismissed" the plaintiff's Title VII claim along with his § 1981 claim. The study's characterization of *Mason* is misleading. The court did not dismiss the plaintiff's Title VII claim for failure to state a cause of action; rather, the court permitted the Title VII case to proceed through the discovery phase and then granted summary judgment to the defendant prior to trial because the plaintiff supplied "no supporting evidence" to support his allegations of Title VII violations. In other words, the court held that the plaintiff had stated a cause of action under Title VII but then had failed to prove his claim. A plaintiff can hardly complain about not being permitted to pursue a § 1981 race discrimination suit when he fails to come forward with sufficient evidence to support the Title VII claim he *is* permitted to pursue.

- [illegible] v. *The Home Ins. Co.*, 1989 U. S. Dist. LEXIS 8733 (S.D.N.Y. 1989). Suit by insurance agency against insurance company with which it had an agency agreement, alleging that insurance company had discriminated against it in business dealings because of the "Hispanic alienage" of the agency's owners. Legal Defense Fund study fails to note that although the court dismissed the plaintiffs' § 1981 claim, the court left the plaintiffs free to pursue their state-law causes of action, including: (1) breach of contract; (2) tortious interference with a contract; (3) tortious interference with business relations; (4) violation of New York General Business Law § 340; and (5) violation of New York Executive Law § 296.

- [illegible] v. *State Farm Ins. Co.*, 1989 U.S. Dist. LEXIS 10666 (E.D. Pa. 1989). Suit by insured against insurer, alleging that insurer discriminated against her on account of her race when it delayed in paying and settling certain claims she had brought against the insurer. Legal Defense Fund study fails to note that although the court dismissed the plaintiff's § 1981 claim, the court left the plaintiff free to pursue her state-law causes of action, including: (1) breach of the duty of good faith and fair dealing; and (2) breach of the insurer's "statutory duties under the Unfair Insurance Practices Act," 40 Pennsylvania Statutes Sec. 11.71.5(a)(10).

- *Torres v. City of Chicago*, 1989 U.S. Dist. LEXIS 9503 (N.D. Ill. 1989). Suit by telephone answering service company against city, alleging that its contract with the city was cancelled because the company failed to show (as required by the city under its minority set-aside program) that at least 51% of the company was controlled by blacks. Legal Defense Fund study fails to note that although the court dismissed the plaintiff's § 1981 claim, the court left the plaintiff free to pursue its state-law cause of action for breach of contract. Moreover, given that the Legal Defense Fund has argued in numerous court cases that minority set-aside programs do not violate the U.S. Constitution, it is hard to believe that the Legal Defense Fund really objects to *Torres*' holding that such programs are not prohibited under § 1981.

- *Rick Nolan's Auto Body Shop, Inc. v. Allstate Insurance Co.*, 718 F. Supp. 721 (N.D. Ill. 1989). Suit by auto body repair company alleging that defendant insurance company had terminated, solely on account of the race of the plaintiff's owners, an agreement whereby the plaintiff performed repair work for the defendant's insureds. The court dismissed the plaintiff's § 1981 claim -- the sole claim contained in the lawsuit -- on the basis of *Patterson*. However, several causes of action are available to the plaintiff under Illinois law, including breach of contract.

If there are gaps in the nation's civil rights laws that leave victims of invidious discrimination without legal recourse, the Legal Defense Fund's study has failed to identify them. Cases cited by the study do not support the study's contention that *Patterson* created such gaps.

The Supreme Court went to great lengths in its *Patterson* decision to make clear that its decision was not intended to "sacrific[e] any significant coverage of the civil rights laws" or to signal "one inch of retreat from Congress' policy to forbid discrimination in the private, as well as the public sphere."[*] Rather, the Court was concerned that an overly expansive interpretation of § 1981 would undermine Congress' "detailed and well-crafted procedures for conciliation and resolution of Title VII claims," since a broadly interpreted § 1981 would permit civil rights plaintiffs to bypass those conciliation and resolution procedures altogether. If the Legal Defense Fund study is opposed to procedures that favor mediation over courtroom confrontation, it should say so directly rather than attacking *Patterson* by inventing non-existent gaps in our civil rights laws.

Both the correctness of the *Patterson* decision as a matter of legislative interpretation and the wisdom of that decision in terms of national civil rights policy are legitimate subjects for public debate. However, the Legal Defense Fund's study of the impact of *Patterson* -- by misrepresenting the holdings of post-*Patterson* court decisions -- does nothing to further that debate.

PREPARED STATEMENT OF THE PEOPLE FOR THE AMERICAN WAY

I am submitting this testimony on behalf of the 285,000 members of the People For the American Way Action Fund to urge your support for the Civil Rights Act of 1990, legislation designed to restore and strengthen important civil rights protections for Americans in the workplace.

We believe that the case for the legislation is compelling. Our conclusion is based on two studies by People For which I would like to summarize for you today.

First, we have analyzed dozens of recent civil rights cases that cite the Supreme Court's 1989 employment discrimination decisions and found clear evidence of the decisions' adverse impact on Americans who are seeking legal redress against unfair treatment at work. In our report on "The Human Impact of the Supreme Court's Civil Rights Retreat," we have illustrated how justice is being denied to the victims of workplace discrimination. Let me cite a few of these:

* As a result of the Patterson decision, discrimination on the job has been legalized. In one such case that illustrates the plight of victims, a major contract for a small Washington, D.C., computer firm was terminated when the contractor learned that the computer firm's president is Jewish. In this case, the district court ruled that even if the victim could prove that the contract was terminated solely because of blatant religious discrimination, he no longer has any remedy under Section 1981.

* In overturning a unanimous 1971 Supreme Court decision by the Burger Court, the Wards Cove decision shifts a difficult burden of proof on employees who suffer discriminatory impact from an employer's practices. As a result, employees face the impossible task of proving that discriminatory practices are not job-related. Another recent case shows the unfairness of this ruling: prospective female firefighters in a Chicago suburb challenged the discriminatory impact of the scoring of an agility test. The new scoring method had a grossly disproportionate impact on women applicants. Before the Supreme Court's Wards Cove ruling, the district judge had found that the city had failed to justify its method of scoring the test, that the woman had proved discriminatory impact, and that the relief should be awarded. After Wards Cove was handed down, however, the court of appeals vacated this decision, noting that while the city had failed to present a convincing rationale for the test scoring, "it is the plaintiff that has the burden of persuasion" that no legitimate end was served.

* Settlement agreements and court-ordered remedies that have been working to stop discrimination have been rendered vulnerable to unlimited attacks by the Supreme Court's Wilks decision. The ruling opens the door to endless lawsuits by saying that individuals who want to challenge such remedies can do so even years after the fact, and even if they were not a party to the

original lawsuit.

For example, a successful court-ordered policy designed to remedy blatant discrimination in Albany, Georgia's city jobs was challenged by a white male who was turned down for a job. Since 1976, Albany has implemented a promotion policy that seeks to compensate for proven historic bias against blacks. Almost a decade later, a white male litigant who was not involved in the original case went to court to attack this remedy. At first, he got nowhere: a 1988 district court opinion dismissed the challenge. The judge -- noting that the challenger admitted in court that the black man who was hired was qualified -- called the case "an isolated attack on a broad-sweeping plan which has been operating smoothly for years." But after the Supreme Court handed down Wilks, an appeals court overturned the lower court ruling, allowing the case to be reopened. The appeals court acknowledged that, as a result, the city of Albany could face "a substantial risk of incurring double, multiple or inconsistent obligations."

Apart from the damage inflicted by the Supreme Court, our nation's civil rights laws contain a serious flaw: equal redress for proven discrimination is not available to all groups. Victims of racial discrimination in the making of contracts can sue for compensatory and punitive damages under Section 1981, as well as other forms of relief (such as back pay) under Title VII. Other victims of discrimination -- such as those who suffer sexual harassment on the job -- are limited to the Title VII remedy (back pay or reinstatement). As a result of this anomaly, some employees who have suffered egregious treatment have been unable to win fair compensation. For example:

* A female car sales representative in West Palm Beach, Florida, suffered sexual harassment and grossly unfair treatment at work. When she declined to date a male co-worker, he and other male sales representatives conspired to cut her off from new customers. They made personal, derogatory remarks to her, sometimes in the presence of customers. Her immediate supervisor allowed derogatory remarks about her to be made in his presence, and used physical force in disciplining her.

When she complained to the general manager, his response was to threaten to fire both her and her harasser. Despite this history of proven harassment, she was unable to win any significant compensation under federal law for what she suffered, since she cannot obtain damages under Title VII.

With each passing day, these victims of workplace discrimination are joined by growing numbers of Americans who now find themselves without legal protection against discrimination on the job. I ask that the full impact study be place in the hearing record.

Secondly, Mr. Chairman, we commissioned the Washington, D.C.

law firm of Arnold of Porter to provide a legal analysis of the combined effect of the four decisions of Lorance v. A.T.& T. Technologies, Wards Cove Packing Company v. Atonio, Price Waterhouse v. Hopkins and Martin v. Wilks on Title VII of the Civil Rights Act, which has been called the "most important part" of the "most important civil rights legislation of this century."

Our legal analysis concludes, however, that the Court's four Title VII decisions have a substantial cumulative negative impact on the overall effectiveness of Title VII in combatting employment discrimination. The decisions affect each major stage of a Title VII proceeding: initiating a claim, proving it in court, and obtaining relief. At each stage, the Court's decisions have erected new barriers making it significantly more difficult for victims of discrimination to succeed, and contradicting prior case law. Since a successful Title VII claim must overcome these barriers at each stage of the proceeding, the cumulative impact of the Court's decisions threatens to substantially weaken Title VII's overall effectiveness.

With respect to the initiation of Title VII claims, for example, the decision in Lorance v. A.T.& T. Technologies held that a claim challenging a discriminatory seniority policy must be brought within 180 days of the date of the policy's enactment, even if employees are not injured or affected until years later. Lower courts have already indicated that Lorance may also apply to other types of discriminatory job rules. As a result, many persons injured by discriminatory employment rules may never even have an opportunity to challenge them in court, as cases decided since Lorance indicate.

Our legal analysis concludes that the Court has also made proof of employment discrimination claims substantially more difficult as a result of its decisions in Wards Cove Packing Co. v. Atonio and Price Waterhouse v. Hopkins. Until Wards Cove, employment tests and other practices were held to violate Title VII where they had a substantial disparate impact on minorities and where employers could not demonstrate that such practices were justified by a business necessity. As a result of Wards Cove, however, employers no longer need to provide such proof, and the plaintiffs must prove that discriminatory practices are not justified by a legitimate business reason, as I have already discussed. Our study demonstrates that Wards Cove effectively reversed an eighteen year old unanimous precedent of the Burger Court and has already had a substantial negative impact in a number of lower court cases.

Another key method of proving discrimination under Title VII has been demonstrating disparate treatment of an employee or job applicant because of race or other prohibited criteria. Prior to Price Waterhouse, most courts held that employers were liable for discriminatory actions even if other non-discriminatory considerations were also mixed into their motives in making job decisions. This meant that even if legitimate reasons precluded

giving an employee a promotion, for example, the employer would still be liable for discrimination and could be enjoined from using discriminatory promotion methods in the future. Under Price Waterhouse, however, as long as employers can prove they had a legitimate reason for an action in which bias also played a role, they can escape liability altogether and no action can be taken to prevent or remedy the discriminatory aspects of their conduct.

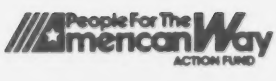
Assuming that a Title VII claim can overcome the barriers at the initiation and proof stages erected by Lorance, Wards Cove, and Price Waterhouse, the final stage is securing effective relief, either through settlement or court order. This stage has been made significantly more problematic as a result of the Court's decision in Martin v. Wilks. Prior to Wilks, most courts held that a consent decree or court order entered in a discrimination case could not be collaterally attacked or challenged. In Wilks, however, as I have previously mentioned, the Court opened the door to endless lawsuits by ruling that individuals who want to challenge such remedies may do so even years after the fact, and even if they sat by and did nothing when the relief was originally entered. During the period of our study alone, an average of one new challenge to an existing employment discrimination remedy was brought every three weeks after Wilks. Several challenges filed prior to Wilks have been extended or revived as a result of Wilks. The decision threatens to extend the litigation of Title VII suits almost endlessly, and to substantially discourage settlement of such claims because of such post-settlement litigation, contrary to Congress' intent to encourage settlement of Title VII litigation. Meaningful settlement of Title VII claims is likely to be discouraged by all four of the Court's Title VII decisions, which cumulatively make it much more difficult to establish and obtain relief against employment discrimination.

Again, I ask that the full study be included in the record.

The impact of the Supreme Court's stunning reversals on civil rights is serious. As we approach a new century, nine out of ten new workforce entrants will be minorities and women. The economic and social health of our nation will hinge on the ability to tap their potential. Our civil rights laws carry forward a vital national mission, and they must be restored and strengthened. This is the essential purpose of the Civil Rights Act of 1990. It deserves your expeditious consideration. Justice delayed will continue to be justice denied. We are confident that the Congress is up to the task.

JUSTICE DENIED

The Human Impact of the Supreme Court's Civil Rights Retreat



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INTRODUCTION

Shortly after a series of 1989 Supreme Court decisions weakened America's fair employment laws, President Bush said: "If the decisions actually turn out to hamper civil rights enforcement... obviously I would want to take steps to remedy the situation."

Just seven months later, there is clear evidence of these decisions' adverse impact on Americans who are seeking legal redress against unfair treatment at work. Drawing from a review of dozens of civil rights cases that cite the Supreme Court decisions, this report spotlights several cases that have been directly and adversely affected by the Court's actions. The report describes additional cases where justice was denied because of a pre-existing weakness in our civil rights law. Together, these human stories show the compelling need for the Civil Rights Act of 1990, new legislation designed to restore and strengthen civil rights protections.

The Supreme Court has blunted the effectiveness of the two most important laws that stand between Americans and employers who practice discrimination. The first is Section 1981 of Chapter 42 of the U.S. Code, the only federal law that allows a victim of racial bias in the workplace to sue the perpetrator for compensatory and punitive damages. (Compensatory damages are designed to provide victims with financial redress for harm done to them; punitive damages are used to punish and deter employers found guilty of particularly egregious discrimination.) Section 1981 is a promise that Congress made more than a century ago to newly freed slaves that they would be treated fairly in the workplace and in other contractual relationships. Yet, in its *Patterson v. McLean Credit Union* decision, the Court sharply reduced the scope of Section 1981, barring many Americans from seeking the strong legal remedies this law alone provides.

The second important law, Title VII of the 1964 Civil Rights Act, protects against workplace discrimination on the basis of race, color, religion, gender and national origin. Unlike Section 1981, it does not provide relief in the form of damages; it offers more limited relief, such as back pay or reinstatement in a job. In a battery of decisions bearing on Title VII discrimination (*Wards Cove Packing Co. v. Atonio, Price Waterhouse v. Hopkins, Lorance v. A.T.& T. Technologies, Inc.* and *Martin v. Wilks*), the Court put heavy legal burdens on Americans who must rely on this remedy for workplace bias.

In the wake of these setbacks, these are the harsh realities of fighting workplace discrimination in today's America:

• **Legalized discrimination on the job.** Before the Court's action, court decisions held that all forms of on-the-job racial discrimination and harassment were illegal under Section 1981. Today, Section 1981's protections only cover the making of job contracts -- protections that end, in most cases, on the first day of work. After that, even the most blatant discrimination may go unremedied under federal law.

• **Onerous burden of proof.** Before the Court's 1989 action, as a result of a unanimous Supreme Court decision in 1971, employers bore the burden of establishing that practices that harmed minorities or women were essential to the needs of business. Now employees must prove that such discriminatory practices have no business justification.

• **Loophole for discrimination.** Before the Court's action, established legal principles suggested it was always unlawful for prejudice to play a role in a job decision. Today, to escape liability completely, all the employer may have to do is show that there was a second, lawful reason for making such a decision.

• **Open season on anti-discrimination plans.** Before the Court's action, fair employment settlements and court-ordered remedies usually represented a permanent resolution of bias cases. Now these plans can be challenged at any time, even years later, by anyone who claims to be affected, spawning endless litigation and re-litigation.

• **Unfair deadlines for challenges.** Because of the Court's action, when an employer adopts a policy that could be discriminatory, employees must file charges against the employer within a very tight time limit (no more than 300 days). Yet employees may not feel any impact of such policies until years after they're adopted -- by which time it's too late to challenge them, the Court said.

The Court's decisions thwart the intent of Congress in passing the civil rights laws: to guarantee fair employment treatment to every American. Dissenting in the *Patterson* case, Justice Brennan wrote that the Court's narrow interpretation of civil rights law is "antithetical to Congress' vision of a society in which contractual opportunities are equal." Dissenting in another decision, Justice Stevens accused the court of "turning a blind eye to the meaning and purpose of Title VII."

This report details the serious civil rights reversals wrought by the Court, provides case histories that illustrate their impact on working Americans, and explains the solutions proposed in the Civil Rights Act of 1990. This new legislation aims to rebuild the nation's civil rights laws so that they can effectively protect all Americans against workplace discrimination. The law includes major provisions aimed at repairing the damage done by the Supreme Court, and an additional major provision designed to provide necessary strength and consistency in the law.

The Civil Rights Act of 1990 will:

• Restore the federal prohibition against racial or ethnic discrimination at any point in the employer - employee (or other contractual) relationship.

• Return the burden of proof to the employer to show the business necessity for a practice that has a proven discriminatory impact.

• Make it clear that it is always illegal for an employer to use race, ethnicity, gender or religion as a motivating factor in employment decisions.

• Preserve the stability and certainty of court-approved plans designed to remedy discrimination.

• Reestablish fair rules for determining when victims of discrimination must file their claims.

• Assure all victims of intentional discrimination -- whether based on race, religion, ethnicity or gender -- the right to sue the perpetrators for damages.

THE CASE FOR THE CIVIL RIGHTS ACT OF 1990: A HUMAN IMPACT STATEMENT

Legalized Discrimination on the Job

Many Americans can no longer sue for damages even when they have suffered the most egregious discrimination on the job, because federal law no longer provides this remedy. In the *Patterson* case, the Supreme Court narrowed the scope of Section 1981 so that it now protects only against discrimination in the "making of contracts" -- which the Court says includes nothing more than hiring and some promotions for employees. Not covered at all is a worker's treatment on the job.

Human Impact. The Court's action has already derailed more than 100 employment discrimination claims. For example:

- A black resident of Birmingham, Alabama, was subjected to severe racial discrimination while employed at an otherwise all-white equipment company. In one incident, the company's owner placed a sandwich on the floor during a lunch and said, "Here you go, my nigger." On at least two occasions, the owner kicked the employee for alleged work-related errors.

Despite the employee's prior experience in many needed skills, he was denied promotion, and actually demoted, because of his race. His one brief stint as shop foreman ended when the owner hired an inexperienced white man for the job, justifying the switch by saying that it was unseemly for a black to be in such a high position.

Before the Supreme Court's action in *Patterson*, a federal district court found

the employer guilty of discrimination under Section 1981 and awarded the victim more than $150,000 in damages. As a direct result of *Patterson*, however, the decision was thrown out on appeal. (The victim cannot sue under Title VII because the employer has fewer than 15 employees.) Even if he is able to win some relief later for discrimination in promotion, the court of appeals made it clear that the blatant harassment he suffered is now legal under the Supreme Court's interpretation of civil rights law.

• The president of a small Washington, D.C. computer firm went to court when he contended that he lost a major contract because of religious discrimination. Although the contractor had always deemed the computer firm's services satisfactory, this longstanding arrangement was abruptly terminated several months after the contractor's manager learned that the firm's president is Jewish. An appeal to the manager's superiors to reconsider produced no results.

After the Court's *Patterson* decision, a district court ruled that even if the victim could prove that the contract was terminated solely because of blatant religious discrimination, he no longer had any remedy under Section 1981.

In the first few months following the *Patterson* decision, such claims were being dismissed at the rate of one per day, according to a November 1989 report from the NAACP Legal Defense and Educational Fund (LDF). The cases disrupted involved people of diverse backgrounds: black, Hispanic, native Hawaiian, Chinese, Filipino, and Jewish. *Patterson*'s devastating effects on the ability of the law to provide them with justice were summed up in a district court ruling regarding black plaintiffs who contended that they had been insulted, harassed and demoted because of bias: "Such conduct is contemptible. After *Patterson*, however, it is not actionable. At least, not under Section 1981."

Far fewer victims of discrimination will even be able to file Section 1981

cases in the wake of the *Patterson* ruling. The issues it raises about the law's scope "will breed conflict and confusion among the lower courts," according to the LDF study. "[T]hat very turmoil is often sufficient, for inexorable economic reasons, to dissuade counsel from handling these cases," the LDF study concludes.

Legislative Solution. The Civil Rights Act of 1990 restores Section 1981's protections to the full extent originally intended by Congress. It will bar discrimination at any point in the employer-employee or other contractual relationship-- hiring, promotion, on-the-job treatment, and termination of employment.

Onerous Burden of Proof

Americans who suffer discriminatory impact from an employer's practices face an almost insurmountable challenge in proving their case in court due to the Supreme Court's *Wards Cove* decision. The Court's action affects cases where firms disproportionately exclude minorities or women from employment. Under a unanimous 1971 Supreme Court decision by the Burger Court in the *Griggs v. Duke Power Co.* case, if an employer wanted to fight charges of discrimination in such a case, it was up to the employer to prove that such policies have a business necessity.

The *Griggs* case was a foundation stone of fair employment law; much of the progress made in the last two decades has been built on that decision. But *Wards Cove* effectively overturned the *Griggs* ruling, which had worked successfully for 18 years. As a result, today, the burden has shifted to employees who must prove a negative: that there is no legitimate business justification for a discriminatory practice.

The *Wards Cove* ruling was sharply criticized in an unusually strongly

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worded dissent written by Justice Blackmun, joined by Justices Brennan and Marshall: "One wonders whether the majority still believes that [discrimination] is a problem in our society, or even remembers that it ever was."

Human Impact. The *Wards Cove* decision is already hampering legal challenges in discriminatory impact cases. For example:

• A woman in Evanston, Illinois was denied the opportunity to become a firefighter when the scoring of one application hurdle -- a test of agility -- was arbitrarily adjusted upward. When she first took the test, a timed physical drill involving crucial activities such as ladder-climbing, she was passed. Since she was not among those hired that year, she tried again two years later. The second time, although she improved her time on the agility test, she was failed. The reason: the city had raised its scoring standard for no reason it was able to justify in court.

The new scoring method was so tough that, based on their 1980 scores on the same test, seven firefighters already on duty would have been failed. The steeper scoring proved to have a grossly disproportionate impact on women applicants: in 1983, less than 13 percent of female applicants passed the agility test, compared with 93 percent of male applicants. As of 1988, there were no women among Evanston's 106 firefighters.

The female applicant took the city of Evanston to court on behalf of all prospective women firefighters to challenge the discriminatory impact of the scoring of the agility test. Before the Supreme Court's *Wards Cove* ruling, the district judge had found that the city had failed to justify its method of scoring the test, that the woman had proved discriminatory impact, and that relief should be awarded. After *Wards Cove* was handed down, however, the court of appeals vacated this decision, noting that while the city had failed to present a convinc-

ing rationale for the test scoring, "it is the plaintiff that has the burden of persuasion" that no legitimate end was served. While she persists in pursuing her case, *Wards Cove* has seriously delayed and impeded her efforts to achieve justice.

• In Chicago, a black bank examiner charged that his employer engaged in racially discriminatory practices in training and promotion. The examination used to determine promotions had a discriminatory impact, blocking or delaying black employees from moving up the company's ladder. White employees had an 85 percent "pass" rate on the exam, while black employees had only a 39 percent "pass" rate. Only 35 out of 2,000 commissioned examiners nationwide were black. The test lent itself to subjective grading: it had no set questions, no set right or wrong answers, no fixed passing grade or time limits, and was abandoned as soon as it was challenged in court.

The black bank examiner sued his employer on behalf of himself and other black examiners. He won his case in district court, which ordered the employer to stop using any tests with discriminatory impact, to report to the court on efforts in that area, and to provide back pay and promotions to specific victims. But then, almost immediately after the Supreme Court's *Wards Cove* decision, the court of appeals ruled that the lower court had put the burden of persuasion on "the wrong party, the employer," and wiped out the lower court's judgment. The case was later settled, but for less relief in some areas than was originally ordered by the district court -- markedly less with respect to preventing future discrimination.

Legislative Solution. The Civil Rights Act of 1990 would restore the earlier standard established in the *Griggs* decision: once an employee proves that a practice has significant discriminatory impact, the burden of proof would return to the employer to show the business necessity for the practice.

Loophole for Discrimination

A vital deterrent to bias in the workplace was weakened severely by the Supreme Court's *Price Waterhouse* decision. Under basic legal principles, employers were liable for their discriminatory actions against employees, even if other more legitimate considerations were also mixed into their motives in making such decisions as refusing to hire them or give them promotions. This meant that even if the legitimate reasons precluded giving an employee the job or the promotion, the employer would be called to account for the discriminatory action. Although the Court's decision in *Price Waterhouse* is unclear, it appears to suggest that as long as employers can prove they had a legitimate reason for an action that is also tinged with bias, the law turns a blind eye toward the racist or sexist aspect of their actions.

Human Impact. The major impact of *Price Waterhouse* has not yet been felt, as courts express widespread confusion about the meaning of the Supreme Court's decision. To illustrate the potential impact of this decision, here is a description of how two pre-1989 mixed motive cases might have come out differently under *Price Waterhouse*:

- A black male employee of the Department of Agriculture applied for and was denied promotion to a supervisory position. He was the only black applicant for the job, and the three-person, all-white selection committee was dominated by an individual who had labelled the employee a "black militant" and who had referred to another black employee as "boy" and "nigger." The court found that even though the committee had legitimate reasons not to promote the black applicant, he still deserved injunctive relief and legal fees under Title VII because he was clearly a victim of overt bigotry. As one member of the court wrote, "the employer should not be able to exculpate its proven, invidious discriminatory practices" by proving that other issues were at play.

Today, in the wake of *Price Waterhouse*, this case might end very differently, with the employer getting off scot-free and able to use the same bigoted person in future selection decisions.

• A black woman in Kansas City, Missouri, was subjected to a sexist barrage of questions when interviewing for a job in a an airline's commissary. The manager asked her a number of questions -- concerning such subjects as her marital status, number of children, child care arrangements and future childbearing plans -- that were not asked of male applicants for the same position. A mother of four, she was turned down for the job. After filing suit, however, she gained both legal fees and an injunction against such future discrimination in hiring, although the court ruled that she was not entitled to the job she applied for.

After *Price Waterhouse*, however, it is unclear whether any relief at all would have been awarded in her case.

Legislative Solution. The Civil Rights Act of 1990 would make it always illegal for an employer to use race, ethnicity, gender or religion as a motivating factor in employment decisions. The Act would provide for court-ordered relief when such a violation is proven, thus protecting against discrimination without forcing employers to hire, promote or rehire individuals who are unqualified.

Open Season on Anti-Discrimination Plans

Settlement agreements and court-ordered remedies that are already working to stop discrimination were rendered vulnerable to unlimited attacks by the Supreme Court's *Wilks* decision. It had long been thought that such decrees were

immune from further legal challenges. However, the ruling opens the door to endless lawsuits by saying that individuals who want to challenge such remedies can do so even years after the fact, and even if they were not a party to the original lawsuit.

Human Impact. Civil rights attorneys predict that *Wilks* will discourage employers from reaching civil rights settlements, because of the open-ended prospect of endless litigation. "The *Wilks* ruling exposes every consent decree to attack and completely destabilizes the entire field of employment discrimination laws," according to Eleanor Holmes Norton, former chair of the Equal Employment Opportunity Commission. The destabilizing effect is already being felt:

• A successful court-ordered policy designed to remedy blatant discrimination in Albany, Georgia's city jobs was challenged by a white male who was turned down for a job. Since 1976, Albany has implemented a promotion policy that seeks to compensate for proven historic bias against blacks. Almost a decade later, a white male litigant who was not involved in the original case went to court to attack this remedy. At first, he got nowhere: a 1988 district court opinion dismissed the challenge. The judge -- noting that the challenger admitted in court that the black man who was hired was qualified -- called the case "an isolated attack on a broad-sweeping plan which has been operating smoothly for years."

But after the Supreme Court handed down *Wilks*, an appeals court overturned the lower court ruling, allowing the case to be reopened. The appeals court acknowledged that, as a result, the city of Albany could face "a substantial risk of incurring double, multiple or inconsistent obligations."

Legislative Solution. The Civil Rights Act of 1990 would correct the

effect of the *Wilks* decision by setting fair standards to be met by interested persons who weren't parties to the original lawsuit but who wish to challenge court-approved plans to remedy discrimination. The standards will provide that nonparties who could be affected are given notice and an opportunity to be heard when such remedies are proposed. They will also bar further challenges once the standards have been met. Thus, the bill will protect the due process rights of interested non-parties without allowing continual re-litigation of these remedies.

Unfair Deadlines for Challenges

The Supreme Court's *Lorance* decision arbitrarily cuts off anti-discriminatory efforts by setting an unreasonable time limit for challenges to employer policies that may be discriminatory. The Court's action affects the starting point for the time period (at most 300 days) during which employees can challenge such policies under Title VII. Under *Lorance*, this time "clock" now starts to run when the policy is adopted by an employer, not when employees begin to feel the effects, which may not happen for years.

The Court's action requires employees to predict somehow the impact of a new policy on their longterm future at work, and to file a lawsuit long before they feel any effect. As Justice Marshall wrote in his dissent in *Lorance*, "employees must now anticipate, and initiate suit to prevent, future adverse applications ... no matter how speculative or unlikely these applications may be." After the time limit is up, employees who have been unable to foresee this impact have no remedy left to them, and discriminatory policies become immune from legal challenge, as a result of *Lorance*.

Human Impact. The full effect of this decision has not yet been felt. As

civil rights attorney Judith Winston of the Women's Legal Defense Fund explains, employees "may not realize they have been hurt" by *Lorance* until it is already too late to challenge an employer's policy, putting employees in a "no-win situation." Lower court decisions suggest considerable confusion about the scope of *Lorance*: although the Supreme Court case concerned a seniority policy, it appears that lower courts may interpret this ruling far more broadly -- as effectively setting a new, shorter time limit for challenges to many employment policies. For example:

• A woman working at an aircraft factory in Pennsylvania was denied a series of promotions, which prompted her to file a discrimination charge against her employer in 1987. She contended that since at least 1984, the company had continuously operated a system which discriminated against female employees, including imposing extra training requirements on women and offering them fewer promotions.

As a result of the Supreme Court's *Lorance* decision, a federal judge ruled that he was "constrained" to dismiss her challenge to the allegedly discriminatory promotion system. Even if the system was indeed discriminatory and continued to deny her promotions on that basis years after it was adopted, the judge explained, *Lorance* required him to throw out any challenge to the system not brought within less than a year of its initial adoption.

Legislative Solution. The Civil Rights Act of 1990 would correct the effects of the *Lorance* decision by reestablishing fair rules for determining the time period in which victims of discrimination must file claims. The Act provides for a longer period to file such claims than under present law after *Lorance* and would prevent the improper foreclosing of challenges to employer practices that may be discriminatory.

Unequal Treatment for Victims

Apart from the damage inflicted by the Supreme Court, our nation's civil rights laws contain a serious flaw: equal redress for proven discrimination is not available to all groups. Victims of racial discrimination in the making of contracts can sue for compensatory and punitive damages under Section 1981, as well as other forms of relief (such as back pay) under Title VII. In contrast, other victims of discrimination -- such as those who suffer sexual harassment on the job -- are limited to the Title VII remedy (back pay or reinstatement). As a result of this anomaly, some employees who have suffered egregious treatment have been unable to win fair compensation. For example:

• A female warehouse worker in Oak Creek, Wisconsin was subjected to nearly four years of extreme sexual harassment from the mostly male workforce, while her employer took no effective action. Male co-workers exposed their buttocks to her, made obscene gestures and subjected her to offensive language. Despite her repeated complaints, no one was disciplined and no investigation was undertaken. Her harassers stepped up the abuse, posting dozens of sexually-explicit drawings of her that other co-workers later described as "cruel" and "downright degrading." Again, despite her protests, no effective action was taken.

After taking a medical leave of absence, she filed a complaint with the Equal Employment Opportunity Commission. A company investigation led to the discharge of several employees who had engaged in the harassment campaign. But for the victim, the story was not over: she suffered severe physical symptoms which her doctor said were "due to her harassment at work."

In a 1984 decision, a federal judge concluded that this "sustained, malicious and brutal harassment...was more than merely unreasonable; it was malevolent

and outrageous." Yet, under Title VII, the only relief she received was less than $2,800 in back pay. She could get no damages under federal law to compensate her or punish those who had systematically abused her.

• A female car sales representative in West Palm Beach, Florida suffered sexual harassment and grossly unfair treatment at work. When she declined to date a male co-worker, he and other (male) sales representatives conspired to cut her off from new customers. They made personal, derogatory remarks to her, sometimes in the presence of customers. When she wore pants to work, one salesman said to her: "We're going to take your pants off and put a skirt on you," and "we're going to take your clothes off to see if you are real." Her immediate supervisor allowed derogatory remarks about her to be made in his presence, and used physical force in disciplining her.

When she complained to the general manager, his response was to threaten to fire both her and her harasser. Despite this history of proven harassment, she was unable to win any significant compensation under federal law for what she suffered, since she cannot obtain damages under Title VII.

Legislative Solution. The Civil Rights Act of 1990 would amend Title VII to allow victims to sue for compensatory and punitive damages, where employers have intentionally violated the law. Jury trials would be available where damages are sought.

CONCLUSION

Immediately after the Supreme Court's stunning reversals on civil rights, President Bush suggested that these were merely "technical" refinements of the law. Seven months later, it is clear that the harsh impact on human lives is anything but "technical." The Court did not fine-tune the machinery of justice; it threw a monkey wrench into its most crucial workings. The casualties have been the victims of workplace discrimination.

Equal justice has been an American dream from the time of our founding. America's government "gives to bigotry no sanction, to persecution no assistance," said George Washington to a Jewish congregation in 1790. "Injustice anywhere is a threat to justice everywhere," wrote Dr. Martin Luther King, Jr. in 1963 as he battled legal discrimination against black Americans.

As we approach a new century, America's long march toward justice is nearing a rendezvous with demographic destiny. During the 1990s, only two of ten new workforce entrants will be white males born in the United States. As minorities, women and immigrant Americans expand their role in our workforce, the economic as well as social health of our nation will hinge on our ability to tap human potential, not curb human opportunity. Our civil rights laws carry forward a vital national mission, and they must be restored and strengthened. That is the essential purpose of the Civil Rights Act of 1990.

THE OVERALL IMPACT OF THE SUPREME COURT"S 1989 DECISIONS ON TITLE VII OF THE 1964 CIVIL RIGHTS ACT

Introduction and Summary

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 200e-17 (1982), has been called the "most important part" of the "most important civil rights legislation of this century."[1] Title VII and the court decisions which have interpreted it have resulted in an interconnected series of significant rules and principles relating to the initiation, proof, and remedies for employment discrimination claims. Working together, these rules and principles have made Title VII a "mighty engine" that is gradually working towards the "elimination of discrimination based on irrelevant personal characteristics from the industrial life of our country."[2]

Twenty-five years after the enactment of Title VII, however, the Supreme Court issued four decisions directly affecting the substantive interpretation of Title VII.[3] Decided by a closely

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[1] N. Schlei, Foreword to B. Schlei & P. Grossman, Employment Discrimination Law at vii (2d ed. 1983).

[2] Id. at xii-xiii.

[3] These decisions include Lorance v. AT&T Technologies, 109 S. Ct. 2261 (1989); Wards Cove Packing Co. v. Antonio, 109 S. Ct. 2115 (1989); Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989); and Martin v. Wilks, 109 S. Ct. 2180 (1989). In addition, the Court issued a decision in Independent Federation of Flight

[Footnote continued on next page]

divided Court in each case, these rulings have potentially broad impact on Title VII, ranging from rules concerning when employment discrimination cases can be initiated to rules relating to final relief. Because of the potentially broad and interconnected impact of these holdings on Title VII, the People For The American Way Action Fund has commissioned this study of the overall impact of the Court's 1989 Title VII decisions on Title VII.

The study was conducted primarily by attorneys and researchers at the Washington, D.C. law firm of Arnold & Porter, led by attorneys Barbara Holden-Smith and Dawn Jablonski, with assistance from the PFAW Legal Department. It focuses on an analysis of the Court's four Title VII decisions, relevant case law prior to these decisions which may have been affected, and cases decided in the lower courts citing these rulings through January 12, 1990, approximately seven months after the decisions were rendered. LEXIS, NEXIS, and other computerized data bases were used in the research.

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Attendants v. Zipes, 109 S. Ct. 2732 (1989), which affects the availability of attorneys' fees in certain employment discrimination cases, and in Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989), which concerns the interpretation of 42 U.S.C. § 1981 (1982). These two decisions are not discussed in this analysis.

As discussed more fully below, this analysis has concluded that the Court's four Title VII decisions have a substantial cumulative negative impact on the overall effectiveness of Title VII in combatting employment discrimination. The decisions affect each major stage of a Title VII proceeding: initiating a claim, proving it in court, and obtaining relief. At each stage, the Court's decisions have erected new barriers, making it significantly more difficult for victims of discrimination to succeed, contradicting prior case law. Since a successful Title VII claim must overcome these barriers at each stage of the proceeding, the cumulative impact of the Court's decisions threatens to substantially weaken Title VII's overall effectiveness.

With respect to the initiation of Title VII claims, for example, the decision in Lorance v. AT&T Technologies[4] held that a claim challenging a discriminatory seniority policy must be brought within 300 days of the date of the policy's enactment, even if employees are not injured or affected until years later. Lower courts have already indicated that Lorance may also apply to other types of discriminatory job rules. As a result, many persons injured by discriminatory employment rules may never even have an opportunity to

[4] 109 S. Ct. 2261 (1989).

challenge them in court, as cases decided since Lorance indicate.

In order to avoid the impact of Lorance, some plaintiffs may be forced to challenge job rules as soon as they are adopted and before they have actually been applied. As the courts have suggested prior to Lorance when discouraging such lawsuits, this could result in unnecessary claims which are difficult for courts to adjudicate and for plaintiffs to prove. The Court has made proof of employment discrimination claims substantially more difficult in any event, however, as a result of its decisions in Wards Cove Packing Co. v. Antonio[5] and Price Waterhouse v. Hopkins.[6]

Wards Cove and Price Waterhouse have significantly undermined the effectiveness of the two most commonly utilized methods of proving discrimination under Title VII: "disparate impact" and "disparate treatment." Until Wards Cove, employment tests and other practices were held to violate Title VII where they had a substantial disparate impact on minorities and where employers could not demonstrate that such practices were justified by a business necessity. As a result of Wards Cove, however, employers no longer need

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[5] 109 S. Ct. 2115 (1989).

[6] 109 S. Ct. 1775 (1989).

provide such proof, and the plaintiffs must now prove that discriminatory practices are not justified by a legitimate business reason. As discussed below, Wards Cove effectively reversed an eighteen-year unanimous precedent of the Burger Court and has already had a substantial negative impact in a number of lower court cases.

Another key method of proving discrimination under Title VII has been demonstrating disparate treatment of an employee or job applicant on the basis of race or other prohibited criteria. Prior to Price Waterhouse, most courts held that employees were liable for discriminatory actions even if other nondiscriminatory considerations were also mixed into their motives in making job decisions. This meant that even if legitimate reasons precluded giving an employee a promotion, for example, the employer would still be liable for discrimination and could be enjoined from using discriminatory promotion methods in the future. Under Price Waterhouse, however, as long as employers can prove they had a legitimate reason for an action in which bias also played a role, they can escape liability altogether and no action can be taken to prevent or remedy the discriminatory aspects of their conduct.

Assuming that a Title VII claim can overcome the barriers of the initiation and proof stages erected by

Lorance, Wards Cove, and Price Waterhouse, the final stage is securing effective relief, either through settlement or court order. This stage has been made significantly more problematic as a result of the Court's decision in Martin v. Wilks.[7] Prior to Wilks, most courts held that a consent decree or court order entered in a discrimination case could not be collaterally attacked or challenged. In Wilks, however, the Court opened the door to endless lawsuits by ruling that individuals who want to challenge such remedies may do so even years after the fact, and even if they sat by and did nothing when the relief was originally entered. During the period of this study alone, an average of one new challenge to an existing employment discrimination remedy was brought every three weeks after Wilks. Several challenges filed prior to Wilks have been extended or revived as a result of Wilks. The decision threatens to extend the litigation of Title VII suits almost endlessly, and substantially discourage settlement of such claims because of such post-settlement litigation. This result is directly contrary to Congress' intent to encourage settlement of Title VII decisions, and cumulatively makes it much more difficult

[7] 109 S. Ct. 2180 (1989).

to establish and obtain relief against employment discrimination.

The remainder of this report will analyze in more detail each of the Court's four Title VII decisions in 1989, including the extent to which each decision conflicts with prior case law and has affected litigation in the lower courts. While each decision individually has important negative effects, the primary conclusion of this analysis is that the combined effect of the Court's 1989 decisions threatens to substantially weaken the effectiveness of Title VII.

Lorance v. AT&T Technologies

In Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261 (1989), the Court, in a 5-3 decision held that a claim challenging a facially neutral seniority policy, alleged to be intentionally discriminatory, is barred if not brought within 300 days of the policy's adoption. The statute of limitations begins to run, the Court held, from the date of the policy's enactment and not from the time the plaintiff is first injured by the policy. As a result of Lorance, plaintiffs must now challenge a discriminatory seniority policy at the time of its adoption, which may be long before they are ever injured by such a new policy. Moreover, lower courts have already suggested that Lorance may be applied to other employment policies and decisions. Thus, Lorance threatens to have serious disruptive effects on Title VII law and on the ability of Title VII plaintiffs to have their day in court.

A. The Lorance Decision

In Lorance, female employees of AT&T claimed that they had been demoted from their jobs as "testers" pursuant to a seniority provision, which had been deliberately adopted by the male-dominated union and AT&T to prevent women from transferring into the higher

paying, and traditionally male, tester job category. The seniority policy was neutral on its face, but the plaintiffs claimed that it had been adopted with the goal of protecting the status of the present male testers against the arrival of predominately female transfers from the plant floor. The new provision forced employees who were transferring to tester jobs to forfeit their accumulated plant seniority. Because the plaintiffs had lost their plant seniority when they became testers, they were demoted from their jobs, while male testers with less plant-wide seniority were not.

Even though none of the plaintiffs had been affected by the policy at the time the policy was adopted, and indeed, two of the plaintiffs were not even testers at the time, the Court, in affirming the decisions of the district and appellate courts, held that the statute of limitations ran from the date of adoption, and not from the date the plaintiffs were demoted pursuant to the seniority policy.[8]

The Court limited its holding to facially neutral policies, and stated that a policy which is explicit in discriminating against women or minorities can be challenged after the policy affects the particular

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[8] Lorance, 109 S. Ct. at 2267.

plaintiff.[9] Thus, where a policy is facially discriminatory, each application of the policy to the detriment of the particular plaintiff would start the limitations period anew.[10] The Court, however, failed to acknowledge that few if any seniority policies will explicitly state that they were adopted with the intent to discriminate. Thus the Lorance rule threatens to allow most, if not all, established seniority policies with discriminatory impact to remain immune from challenge. Moreover, as Justice Marshall noted in dissent, this distinction between facially neutral and facially explicit discriminatory policies "serves only to reward those employers ingenious enough to cloak their acts of discrimination in a facially neutral guise, identical though the effects of this system may be to those of a facially discriminatory one." Id. at 2271 (Marshall, J., dissenting).

B. The Impact of Lorance

The damage of the Lorance decision is not limited to "immunizing seniority systems from the requirements of Title VII,"[11] for Lorance threatens to affect Title VII non-seniority cases as well. A review of

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[9] Id. at 2269.

[10] Id. at 2269 n.5.

[11] Id. at 2273 (Marshall, J., dissenting).

recent lower court decisions applying and discussing Lorance shows that the courts are already beginning to look to the Lorance holding to determine when the statute of limitations begins to run on claims that are not based on allegedly discriminatory seniority policies.

For example, in Davis v. Boeing Helicopter Co.,[12] Mary Davis alleged that the defendant Boeing Helicopter Company unlawfully discriminated against her on the basis of her sex by denying her promotions from a labor grade 4 to a labor grade 7. Davis was hired as a labor grade 4 on January 3, 1983. On October 12, 1984, she first became eligible for a promotion to labor grade 7. From that time until her promotion in March 1985, plaintiff had been denied promotions five times. She alleged that the defendant's failure to promote her sooner was discriminatory because it was the result of policies that required females to complete training not required of males, and that allowed males to be promoted to higher grades more readily than females. She also alleged that she would have progressed considerably further within the company if she had been male.

Even though the plaintiff did not allege that the seniority policy was responsible for the company's

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12 No. 88-0281 (E.D. Pa. Oct. 24, 1989) (LEXIS, Genfed library, Dist file).

failure to promote her, the district court nevertheless applied Lorance and held that, because the system of promoting employees based on a seniority listing of eligible individuals was in effect at least as early as 1984, her claim was barred by the statute of limitations.[13]

Other lower court decisions, while not resting their holdings specifically on Lorance, have cited and discussed that case in the context of reviewing the timeliness of non-seniority claims. For example, in Malhotra v. Cotter & Co.,[14] the plaintiff, an accountant of East Indian ancestry, brought a Title VII suit claiming that on ten separate occasions between 1979 and 1984, the employer had refused to promote him because of his ancestry. In the course of holding, for other reasons, that the limitations period had run on the plaintiff's claims, the Seventh Circuit Court of Appeals cited Lorance for the proposition that "Title VII's statute of limitations begins to run when the employer implements a discriminatory policy (or the plaintiff is hired by an employer who has such a policy in force)."[15]

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13 Davis, LEXIS at 4-5.

14 885 F.2d 1305 (7th Cir. 1989).

15 Id. at 1310.

In Artis v. U.S. Industry,[16] the plaintiff claimed that the employer installed an engine lathe in 1981 but refused to give the plaintiff instructions on how to run the machine. During 1982, thirteen machinists, including plaintiff, were laid off. Plaintiff was the most senior of these machinists and the only black person. Later in 1983, the employer needed machinists to run the engine lathe and asked three white machinists who had more seniority than plaintiff but who had not been laid off, but who also did not have training on the engine lathe, whether they would be willing to run the lathe. These machinists refused. The employer then decided to recall two other machinists who had less seniority than the plaintiff but who had had training on the engine lathe. Later in 1983, plaintiff brought suit claiming that the employer had refused to train him on the lathe because of his race and that the employer had recalled the two white machinists with inferior seniority.

In a motion for summary judgment, the defendants argued that the plaintiff's failure to train claim was time-barred. In ruling on the motion, the court held that, in order to dismiss plaintiff's claims under Lorance, the court must find that not only was the

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16 720 F. Supp. 105 (N.D. Ill. 1989).

plaintiff's claim outside the limitations period, but also the defendant must (1) demonstrate that the plaintiff knew or should have known at the time of the original action that he had suffered or would suffer "concrete" harm; and (2) that the defendant must demonstrate that the plaintiff knew or should have known at the time of the original action that it was discriminatory.[17] The court ruled that material issues of fact related to the plaintiff's knowledge remained, and therefore the defendant was not entitled to summary judgment.[18] However, the court noted that Lorance "certainly imposes a burden on potential plaintiffs to anticipate the consequences of present actions."[19]

Similarly, in EEOC v. City of Chicago,[20] the court in an Age Discrimination in Employment Act case held that the plaintiff's claims were not time-barred under the continuing violation doctrine. In discussing whether Lorance applied to the case at all (because Lorance involved a seniority system which raises distinct employment issues), the court noted that "rightly or wrongly most lower courts" have interpreted

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17 Artis, 720 F. Supp. at 107.

18 Id.

19 Id. at 108.

20 51 FED ¶ 39,421 N.D. Ill. (November 1989).

prior Supreme Court decisions, which also involved only seniority systems, to apply to a variety of employment practices other than seniority policies. The court therefore felt compelled to decide whether Lorance applied to the case before it. While the court decided that Lorance did not apply, the decision was based on the fact that Lorance involved a facially neutral policy while the case before the court involved a facially discriminatory one.

Prior to Lorance, most circuit courts had held that even though an allegedly discriminatory policy had been put into effect long before the plaintiff brought suit, the plaintiff's claim was not barred so long as the policy had been applied to the plaintiff during the limitations period under the "continuing violation" theory. In order to establish a continuing violation of Title VII, most courts have ruled a plaintiff must show some application of the illegal policy to the plaintiff (or to the class) within the 180 days preceding the filing of the complaint. See Perez v. Laredo Junior College, 706 F.2d 731, 733-34 (5th Cir. 1983) ("if the statutory violation occurs as a result of a continuing policy, itself illegal, then the statute does not foreclose an action aimed at the company's enforcement of the policy within the limitations period"), cert. denied, 464 U.S. 1042 (1984); Cook v. Pan American World

Airways, Inc., 771 F.2d 635, 646 (2nd Cir. 1985) (running of statute delayed until statute begins to run after the "last discriminatory act in furtherance" of "continuous pracice and policy of discrimination"), cert. denied, 474 U.S. 1109 (1986); McKenzie v. Sawyer, 684 F.2d 62, 72 (D.C. Cir. 1982) (maintenance of discriminatory system or one of related acts must fall within limitations period); Williams v. Owens-Illinois, Inc., 665 F.2d 918, 924 (9th Cir.) (distinguishing between continuing discriminatory policies and continuing impact of discrete acts of discrimination), cert. denied, 459 U.S. 971 (1982).

These cases establish the principle that, although an employee may have suffered an injury when first classified on the basis of a discriminatory policy or practice, each application of that policy or practice which adversely affects the employee constitutes an independent act of discrimination for which the statute of limitations starts to run anew. In addition to the problems Lorance raises for challenges to seniority and other employment policies, it raises the possibility that these helpful lower court precedents will be undermined, thus seriously eroding the continuing violation doctrine.

Finally, Lorance may produce premature litigation, filed early in an effort to avoid Lorance, which could foreclose later, better grounded Title VII challenges. Some plaintiffs may file lawsuits against employer policies as soon as they are adopted, before realizing what impact, if any, such policies may have. As one court has explained in warning against such actions:

> It is unwise to encourage lawsuits before the injuries resulting from the violations are delineated, or before it is even certain that injuries will occur at all. A claim of conjectural future injury is much more poorly suited to adjudication than one in which the application of the discrimination and the injury caused thereby are more clearly established.

Johnson v. General Elec., 840 F.2d 132, 136 (1st Cir. 1988).

Wards Cove Packing Co. v. Antonio

The Supreme Court's decision in Wards Cove Packing Co. v. Antonio,[21] makes it significantly more difficult to challenge systemic practices which are discriminatory because they have a disparate impact on racial or other grounds. In order to establish a prima facie case of disparate impact under Title VII after Wards Cove, a plaintiff has the burden of proof of making a stringent statistical showing of disparate impact and identifying specific practices which cause the disparity and specifically show a significantly disparate impact on employment opportunities for non-whites as a result of each of the identified challenged practices.

Even more important, Wards Cove overrules the Supreme Court's unanimous decision in Griggs v. Duke Power Co.,[22] and its progeny, and relieves an employer of the burden of persuading the court that practices with significant discriminatory impact in fact are justified by business necessity. It is now deemed sufficient that an employee merely advance a nondiscriminatory business reason for such practices. A

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21 109 S. Ct. 2115 (1989).

22 401 U.S. 424 (1971).

plaintiff can seek to rebut the alleged nondiscriminatory business reason by showing an alternative that is less discriminatory and equally as effective in meeting legitimate employer goals. However, in light of Wards Cove, courts are unlikely to opt for such alternatives.

A. The Decision in Wards Cove

In Wards Cove, non-white cannery workers sued two companies that operate seasonal salmon canneries in remote areas of Alaska, alleging that various employment practices led to racial stratification of workers and denial of employment in non-cannery company positions on the basis of race. There were two types of jobs at the canneries: "cannery jobs," unskilled positions on the cannery lines, and there were various "non-cannery jobs," generally classified as skilled positions.

Filipinos employed pursuant to an agreement with a local union and Alaska natives residing in villages near the canneries filled the cannery jobs, while non-cannery jobs were filled with predominantly white workers hired off-season from the companies' base offices. The predominantly white, non-cannery workers were generally paid more than the unskilled, predominately minority, cannery workers. The plaintiffs alleged a variety of employment practices, contending that "nepotism, a rehire preference, a lack of objective

hiring criteria, separate hiring channels, [and] a practice of not promoting from within,"[23] were responsible for severe racial stratification of workers and denial of employment in non-cannery company positions on the basis of race.[24]

Plaintiffs' proof included evidence that the defendant maintained racially separate hiring posts, dormitories, and cafeterias, as well as job categories. On appeal, the Ninth Circuit concluded that the plaintiffs had established a prima facie case of discrimination based on these disparities and the employer therefore had the burden to prove that the disparate impact caused by the employer's practices was justified by business necessity.[25]

The Supreme Court reversed in a 5-4 decision. The Court held that statistical evidence of a high percentage of minority workers in cannery jobs and a low percentage of minority workers in non-cannery jobs did not establish a prima facie case of disparate impact in violation of Title VII.[26] The Court rejected as inadequate a comparison between the starkly different

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23 Wards Cove, 109 S. Ct. at 2120.

24 Id.

25 Antonio v. Wards Cove Packing Co., 827 F.2d 439 (9th Cir. 1987), rev'd, 109 S. Ct. 2115 (1989).

26 Wards Cove, 109 S. Ct. at 2123-24.

racial compositions of the cannery and non-cannery work forces. The majority decision in Wards Cove requires Title VII plaintiffs to produce statistically valid evidence of disparate impact; a statistically valid comparison "between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs."[27] Where labor market statistics are "difficult if not impossible to ascertain . . . certain other statistics . . . are equally probative."[28]

The Wards Cove majority provided further evidentiary burdens for plaintiffs bringing Title VII disparate impact claims. For a prima facie case, plaintiffs must first demonstrate disparate impact statistically; then they must also identify the particular employment practice that produces disparate impact[29] and must "specifically [show] that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites."[30]

Once plaintiffs meet these additional burdens of proof, the Court explained, employers are then compelled

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27 Wards Cove, 109 S. Ct. at 2121.

28 Id. An example of such other statistics would be "measures indicating the racial composition of 'otherwise qualified applicants' for at-issue jobs".

29 Id. at 2125.

30 Id.

to produce evidence of business justification. The burden on defendants is a burden of production only, however, for Wards Cove establishes that plaintiffs bear the burden of persuasion at all times.[31] If an employer is able simply to adduce some evidence that a challenged practice significantly serves the legitimate employment goals of the employer, the plaintiffs, to prevail, must persuade the finder of fact of the availability of a less discriminatory alternative selection practice that would be "equally as effective" in serving the employer's legitimate employment goals.[32]

The Supreme Court warned the lower courts that they are less competent than employers in restructuring business practices and therefore they should ordinarily be reluctant to order an alternate selection practice. It ruled that "[f]actors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals."[33]

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[31] Wards Cove, 109 S. Ct. at 2126.

[32] Id. at 2126-27.

[33] Id. at 2127, citing Watson v. Fort Worth Bank and Trust, 108 S. Ct. 2777, 2790 (1988).

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B. The Impact of Wards Cove on Prior Title VII Case Law

Wards Cove toppled the unanimous decision of the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971).[34] Griggs established that even an employer acting in good faith may violate Title VII if its practices operate to exclude minorities. Making it clear that a neutral practice operating to exclude minorities will be lawful only if justified by a valid business purpose, the Court stressed in Griggs that "[t]he touchstone is business necessity."[35] "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."[36] The holding in Wards Cove is directly contrary to this Congressional directive.

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[34] The chipping away of Griggs' foundation began in 1988 with Watson v. Fort Worth Bank and Trust, 108 S. Ct. 2777 (1988).

[35] Griggs, 401 U.S. at 431; accord Wards Cove, 109 S. Ct. at 2129 (Stevens, J., dissenting).

[36] Griggs, 401 U.S. at 432. Numerous court decisions since Griggs had followed this rule, and held that defendants must prove that a selection device is essential to job performance if it produces a disparate impact under Griggs. These decisions were effectively overruled by Wards Cove. See, e.g., Dothard v. Rawlinson, 433 U.S. 321, 331-32 n.14 (1977); Watkins v. Scott Paper Co., 530 F.2d 1159, 1168 (5th Cir.), cert. denied, 429 U.S. 861 (1976); United States v. Bethlehem Steel Corp. 446 F.2d 652, 662 (2d Cir. 1971).

Wards Cove also contradicts previous Supreme Court opinions by barring the use of evidence of racial stratification in the workforce. Previous Supreme Court case law "demonstrate[s] that in reviewing statistical evidence, a court should not strive for numerical exactitude at the expense of the needs of the particular case."[37] Requiring practice-by-practice statistical proof of causation to establish a prima facie case is "unwarranted" because a plaintiff necessarily has the burden of connecting the injury to an act of the defendant.[38] However, "the act need not constitute the sole or primary cause of the harm . . . . Thus in a disparate impact case, proof of numerous questionable employment practices ought to fortify an employee's assertion that the practices caused racial disparities."[39]

C. The Impact of Wards Cove in the Lower Courts

Since Wards Cove changes the evidentiary and burden of proof standards in proving Title VII violations, plaintiffs will attempt to adjust their evidence in an effort to meet Wards Cove's statistical requirement, and court decisions often may not discuss

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[37] Wards Cove, 109 S. Ct. at 2133 (Stevens, J., dissenting).

[38] Id. at 2132.

[39] Id. at 2132-33.

the exact impact Wards Cove has had on the outcome of specific litigation. Nevertheless, in a period of only seven months, three appellate court decisions and a number of other cases suggest that Wards Cove has already had a severe adverse impact on Title VII cases.

Three recent court of appeals decisions show that Wards Cove has already had a severe adverse impact on Title VII cases. In Allen v. Seidman,[40] plaintiffs representing a class of black bank examiners employed by the Federal Deposit Insurance Corporation (FDIC) sued the FDIC under Title VII, alleging that a formal test used as a tool in promoting bank examiners from one pay level to a higher pay level resulted in a disparate impact. The evidence had demonstrated that blacks had only a 39% "pass" rate on the exam while whites had an 83% "pass" rate, and that only 35 of 2000 commissioned examiners were black.[41] Based on Griggs and the disparate impact test, the district court found for plaintiffs and granted comprehensive relief.

Although the court of appeals agreed with the district court that the plaintiffs had demonstrated a disparate impact, the court of appeals reversed the lower court decision and remanded as a result of Wards

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[40] 881 F.2d 375 (7th Cir. 1989).

[41] Id. at 378.

Cove. Because "the Supreme Court [in Wards Cove] ha[d] changed the ground rules for disparate-impact litigation as they were understood by most lower courts," the court of appeals reversed the lower court because it had apparently placed the burden of persuasion as to the question of the FDIC's business necessity defense on the employer.[42]

Wards Cove also forced minority plaintiffs to return to the courtroom in the companion case of Evans v. City of Evanston,[43] a class action brought on behalf of women applicants for city firefighter positions. The district court found that the city did not justify its method of scoring a physical agility test where the passing grade was one standard deviation above the mean score. Based on that standard, the test had had an extreme disparate impact on women, resulting in the disqualification of over 87% of female applicants but only 7% of male applicants.[44] The evidence also showed that seven firefighters already on duty would

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[42] Allen, 881 F.2d at 381. Indeed, the court in Allen suggested that the "business necessity" defense in the wake of Wards Cove should perhaps be renamed the "issue of legitimate employer purpose." Id. Subsequent to the court of appeals decision in Allen, the case was settled by plaintiffs for less relief than ordered by the district court.

[43] 881 F.2d 382 (7th Cir. 1989).

[44] Evans v. City of Evanston, 621 F. Supp. 710, 712 (D.C. Ill. 1985).

have failed the test based on the method of scoring used, and that the named plaintiff had passed the test two years earlier with a lower score, but then was failed because of the scoring method at issue.[45] The district court found the test to violate Title VII and ordered relief.

After Wards Cove, however, the court of appeals reversed. The court explained that "while it is quite likely that [the lower court judge] thought the scoring method [was] no good,"[46] the language of the lower court opinion might have placed the burden of persuasion on the city and, therefore, a remand was necessary to answer the question of whether the plaintiff had shown that the method of scoring the test was unreasonable under the standard of Wards Cove.

The Fifth Circuit case of Bernard v. Gulf Oil Corp.,[47] demonstrates the practical problems imposed by the Wards Cove requirement that plaintiffs have the burden of proving (a) that the challenged practice does not significantly serve legitimate employment goals; or (b) that a less discriminatory alternative is equally

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45 Evans v. City of Evanston, 695 F. Supp. 922, 925, 928 (N.D. Ill. 1988), vacated, 881 F.2d 382 (7th Cir. 1989).

46 Evans, 881 F.2d at 385.

47 890 F.2d 735 (5th Cir. 1989).

effective. The plaintiffs in Bernard were challenging the adoption of a policy reclassifying workers at one of Gulf's refineries. The court of appeals specifically found that the reclassification resulted in many white workers being promoted while many black workers were demoted.[48] This was the result of the elimination of two positions to streamline the lines of progression in the refinery. "Craft helpers" were reclassified as "mechanical trainers", a promotion, upon passing a simple test. "Mechanical helpers" were reclassified as "utility men", a demotion.

The policy unquestionably had an adverse impact on minorities; most of those employees promoted to mechanical trainers were white, while most of those employees demoted to utility men were black.[49] The Court of Appeals found, however, that the district court was not clearly erroneous in finding that although the reclassification may have had an adverse impact on blacks, plaintiffs had failed to prove it was not justified by legitimate business purposes under Wards Cove.[50]

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48 Bernard, 890 F.2d at 738.

49 Id. at 738.

50 Id. at 740.

Following Wards Cove, the Bernard court placed the burden of persuasion on the minority plaintiffs to prove that the reclassification did not significantly serve legitimate employment goals of Gulf.[51] The court found that the alternative proposed by the plaintiff class[52] was not shown by the plaintiffs to be equally as effective as the adopted reclassification in meeting Gulf's objectives.

The district court had found that: "Gulf wanted to simplify the lines of progression through reorganizing, and wanted to increase the number of craft trainees, leading to an increase in the number of persons who were trained to handle all aspects of a craft."[53] The court of appeals stated that Gulf had a legitimate business reason for its ultimate choice of a reclassification option, that is, "it wanted to reclassify as trainees those workers with the most craft experience so they would need less training."[54] This cost consideration is relevant under Wards Cove in

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51 Bernard, 890 F.2d at 740.

52 The alternative proposed by the plaintiff class was to demote all craft helpers to utility men and draw the mechanical trainees from the pool of demoted mechanical helpers and craft helpers. Id. at 741.

53 Id.

54 Id.

determining an alternative that is "equally as effective."[55]

The combination of the burden of persuasion remaining on the plaintiff at all times and the requirement that the proposed alternative be equally as effective and no more costly was a burden too great for the minority plaintiff class to bear given the emphasis placed by the Wards Cove Court on cost and its qualification of the business justification defense, despite the clear discriminatory impact of the employment practice in Bernard.

The adverse impact of Wards Cove is also seen in EEOC v. Carolina Freight Carriers Corp.,[56] where the bench trial was held in the three days following the issuance of the Wards Cove decision. The Equal Employment Opportunity Commission (EEOC) sued Carolina Freight Carriers Corporation (Carolina Freight) on behalf of Francisco Rios, an employee of Carolina Freight. Among other things, the EEOC alleged that Carolina Freight violated Title VII by maintaining a discriminatory employment practice. Carolina Freight

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55 See Wards Cove, 109 S. Ct. at 2127 (citing Watson). The Allen court commented that the "business necessity" defense is "now a misnomer, since the 'defense' does not require a showing of necessity and is no longer an affirmative defense". Allen, 881 F.2d at 377.

56 51 Fair Empl. Prac. Cas. (BNA) 364 (1989).

had a policy of refusing to hire any applicant with a criminal conviction which resulted in an active prison sentence, no matter how far in the past. The EEOC challenged this policy for its disparate impact upon Hispanics.

Citing Wards Cove, the court found that the EEOC failed to prove a disparate impact caused by Carolina Freight's conviction policy because it used improper statistics.[57] The statistics should relate to the national origin composition of at-issue jobs and the national origin composition of the relevant labor market; but the EEOC had failed to adequately define the relevant labor market in its studies.[58] The court also found that Carolina Freight had met its burden of production by establishing a legitimate nondiscriminatory justification for its conviction policy.[59]

The court recognized that even though defendant had met its burden of production as to business justification, the plaintiff could still prevail by demonstrating the availability of alternative, equally effective employment practices that had a less

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57 Carolina Freight, 51 Fair Empl. Prac. Cas. (BNA) at 376-77.

58 Id.

59 Id. at 377-78.

restrictive impact on Hispanics.[60] The EEOC had contended that Carolina Freight's business needs did not justify a lifetime bar to employment because of a conviction resulting in a prison sentence. The EEOC proposed as an available option for Carolina Freight a five to ten year limit on consideration of convictions as opposed to the lifetime bar policy that was adopted. However, this alternative was not even considered by the court because "apparently on the mistaken view that the defendant carried the burden of persuasion on this issue, the plaintiff failed to adduce proof that such a limited conviction policy would be either equally effective in deterring employee theft or have a less restrictive effect on the hiring of Hispanic truck drivers."[61] Thus, because Wards Cove established that the burden of persuasion remains with the plaintiff at all times, the EEOC's proof fell short on the alternative it proposed. Taking note of the Wards Cove admonition that Courts should be reluctant to "restructure business practices," the court refused to overturn or further probe Carolina Freight's conviction policy.[62]

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60 Id. at 379.

61 Carolina Freight, 51 Fair Empl. Prac. Cas. (BNA) at 379.

62 Id.

In Lu v. Woods,[63] an Asian-American employee brought an employment discrimination suit alleging, among other things, a claim of national origin discrimination based on the disparate impact theory. Plaintiff was a foreign service officer with the Agency for International Development ("AID") and claimed that since 1984 he was not promoted to a more highly compensated level because he is Chinese. Although plaintiff's statistical evidence addressed the under-representation of Asian-Americans in both AID's work force generally and in "high ranked" positions at AID, the allegedly high proportion of Asian-Americans in "low ranked" positions at AID, and the "unfavorable treatment" that Asian-Americans receive from AID's Selection Board, the court found that the plaintiff failed to satisfy his initial evidentiary burden.[64] Because the plaintiff failed to identify the precise practices alleged to be responsible for the disparate impact in the entire AID workplace and did not specify precisely how each identified practice had resulted in the alleged disparity, as required by Wards Cove, the

63 717 F. Supp. 886 (D.D.C. 1989).

64 Lu, 717 F. Supp. at 891.

plaintiff failed to establish a prima facie case of disparate impact.[65]

D. Conclusion

Wards Cove has already had profound adverse impact on reported Title VII lawsuits. Wards Cove's overall impact, however, goes far beyond the cases reported to date. These reported cases do not reflect the many lawsuits that may not be filed or those that will be filed and dismissed as a result of the increased burden of proof which Wards Cove imposes upon Title VII plaintiffs. For example, a recent report indicates that as a result of Wards Cove, the EEOC has delayed, and may not even file, a suit on behalf of over 100 Mexican farmworkers in California who were allegedly discriminated against by their employer.[66]

As University of California professor of business administration Johnathan Leonard has explained, lawsuits brought under Griggs to challenge systemic discrimination have had a major impact in "reshap[ing] American employee practices" which have had a

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[65] Id.

[66] San Jose Mercury News, July 3, 1989, at 1C. Specifically, the employer allegedly fired the workers for purportedly failing to provide accurate name and social security number information, but then rehired them as entry level workers, depriving them of seniority pay and benefits.

discriminatory impact.[67] But "these are exactly the cases," Professor Leonard has concluded, "that have had the wind taken out of their sails" by Wards Cove.[68]

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67 Id.

68 Id.

Price Waterhouse v. Hopkins

The Supreme Court's decision in Price Waterhouse v. Hopkins,[69] also will have a significant adverse effect on a plaintiff's ability to prove a Title VII violation. The literal language of the decision suggests that blatant discrimination may not violate Title VII when a defendant demonstrates that it would have made the same specific employment decision in the absence of discrimination.

A. The Price Waterhouse Decision

Ann Hopkins, a senior manager at the accounting firm of Price Waterhouse, had a superior record of achievement at the firm, but nevertheless was passed over for partnership. Based on evidence showing that Hopkins and other female partnership candidates had been evaluated in sexist terms, such as that she "overcompensated for being a woman" and was too "macho," the district court found, after a full trial on the merits, that the decision not to admit her to partnership had been impermissibly tainted by sexual stereotyping.[70] However, the district court also found

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69 109 S. Ct. 1775 (1989).

70 Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1119-20 (D.D.C. 1985), aff'd in part, rev'd in part, 825 F.2d 458 (D.C. Cir. 1987).

that the Price Waterhouse firm legitimately took into account interpersonal skills in making its partnership decisions.[71] It stated that Price Waterhouse could avoid equitable relief only by proving, through clear and convincing evidence, that it would have made the same decision to deny Hopkins admission to partnership absent the illegal stereotyping and based on the legitimate reason alone.[72] The district court further held that the firm had failed to meet this burden. The court of appeals affirmed.[73]

The Supreme Court reversed, holding that the standard of proof in a Title VII action, as in most other civil actions, is the lower preponderance of the evidence standard, and not the higher clear and convincing evidence standard.[74] In reaching this decision, the Court also established new evidentiary standards for analyzing cases in which an adverse employment decision has been based on both discriminatory and legitimate motives. Under the Court's new standards, an employer in such "mixed motive" cases bears the burden of proving that it would

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71 Id. at 1120.

72 Hopkins, 618 F. Supp. at 1120.

73 Price Waterhouse v. Hopkins, 825 F.2d 458 (D.C. Cir.), rev'd, 109 S. Ct. 1775 (1989).

74 Price Waterhouse, 109 S. Ct. at 1793.

have made the same decision in the absence of the discriminatory motive. If the employer can meet this burden, it "may avoid a finding of liability."[75]

In some respects, the Price Waterhouse decision represented a victory for plaintiffs. The victory stems from the Court's recognition that the employer, and not the plaintiff, should bear the burden of showing what the employment decision would have been in the absence of the illegal discrimination. However, the victory was seriously diminished by the Court's holding that this same decision evidence goes to defeating liability and not, as the plaintiffs had urged, to determining the remedy. A literal reading of the Court's decision suggests that an employer may escape all consequences, including injunctive relief, of engaging in a clearly discriminatory practice under such circumstances.

B. The Effects of Price Waterhouse

Interpreted in this way, Price Waterhouse represents a radical departure from prior case law. Previously, lower courts have held that, in mixed motive cases, a "same decision" showing could defeat a plaintiff's claim for remedies such as restatement, promotion, backpay and the like, but once the plaintiff has proven that the discriminatory motive played a part

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75 Id. at 1787.

in the adverse decision, the plaintiff would be entitled to injunctive relief and attorneys' fees.[76] The decision in Price Waterhouse, however, appears to directly contradict these holdings.

Because the Court did not specifically address the question of injunctive relief in a mixed motive case, it is not clear whether that remedy would still be available in "same decision" cases.[77] Theoretically, if injunctive relief is not available, an employer that has engaged in a practice of blatant discrimination may go

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[76] See, e.g., Bibbs v. Block, 778 F.2d 1318 (8th Cir. 1985); King v. Trans World Airlines, Inc., 738 F.2d 255 (8th Cir. 1984); Ostroff v. Employment Exchange, Inc., 683 F.2d 302 (9th Cir. 1982); and Nanty v. Barrows Co., 660 F.2d 1327 (9th Cir. 1981).

[77] It should be noted that, in cases decided since Price Waterhouse, lower courts have exhibited confusion over the kind and quality of evidence necessary to rise to the level of the "direct evidence" Price Waterhouse requires before the burden of proof shifts to the defendant to make out the same decision defense. See, e.g., Randle v. LaSalle Telecommunications, Inc., 876 F.2d 563 (7th Cir. 1989) (plaintiffs' direct evidence of racial intent did not meet the Price Waterhouse threshold, even though the plaintiffs had produced evidence of various remarks showing racial animus); Jackson v. Commonwealth Edison, No. 87-C-4449, slip op. at 6 (N.D. Ill. July 6, 1989) (WESTLAW, 1989 WL 105273) (district court found Price Waterhouse "puzzling" and wondered whether the Supreme Court had merely forgotten or ignored circumstantial evidence). However, none of the cases reported after Price Waterhouse have specifically addressed the issue of whether a plaintiff in a mixed motive case is entitled to injunctive relief and attorneys' fees if the defendant succeeds in carrying its burden of proof on the issue of whether the same decision would have been made in the absence of discrimination.

completely free because it is able to consistently defeat the particular plaintiff's claim based on the same decision defense. Review of the facts of several previously decided cases of this type shows the significant negative impact of Title VII that this aspect of Price Waterhouse threatens to create.

In Bibbs v. Block,[78] Thomas Bibbs, who is black, applied for but was denied a promotion to a supervisory position in the Agricultural Stabilization and Construction Service (ASCS), a division of the Department of Agriculture. Seven people applied for the promotion, all of whom, except for Bibbs, were white. The selection committee was composed of three people, all of whom also were white. One member of the committee, whom the district court found to be the "key figure" in the selection process, had referred to Bibbs as a "black militant" and had referred to another black print shop employee as "boy" and "nigger." The committee unanimously picked a white candidate for the promotion on the basis of wholly subjective criteria.

The district court found that Bibbs' history of disciplinary and interpersonal problems played a part in the decision not to select him, and so denied Bibbs' claim. The Eighth Circuit Court of Appeals, however,

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[78] 778 F.2d 1318 (8th Cir. 1985).

found that the ASCS had violated Title VII and remanded the case for a finding on remedy, but with promotion and back pay to be awarded only if the ASCS was unable to prove that it would have made the same decision absent the racially discriminatory motive. The appeals court also ordered the district court to enter an injunction prohibiting ASCS from future or continued discrimination against Bibbs on the basis of his race, as well as an award of attorneys' fees. As one judge noted in a concurring opinion, "the employer should not be able to exculpate its proven invidious discriminatory practices," by proving that it also based its decision on other factors.[79] However, under the language of Price Waterhouse, Bibbs could not obtain either injunctive relief or attorneys' fees even though the appeals court found that the ASCS violated Title VII.

In King v. Trans World Airlines, Inc.,[80] Ernestine King, a mother of four, had been employed by TWA as a probationary kitchen helper in the Kansas City dining and commissary, but was terminated during a reduction-in-force. Because as a probationary worker she was not subject to automatic recall, she later filed several applications for employment in the dining and

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79 Id. at 1327 (Lay, C.J., concurring).

80 738 F.2d 255 (8th Cir. 1984).

commissary department. During an interview for the position, the manager of the department asked her questions about her pregnancy during her probationary employment, her marital status, the number of children she had and whether they were illegitimate, her child care arrangements, and her future childbearing plans. The evidence showed that such questions were not asked of males during interviews and indeed that TWA had a policy against asking these types of questions of males or females. Even though TWA hired 10 kitchen helpers during the month of December, late in that month the manager told King there were no openings.

King also offered as evidence in her case the testimony of a former TWA personnel department employee, Francine Gill. According to Gill, who was employed by TWA for two years as an interviewer, the dining and commissary department manager frequently discussed with her his concern about childcare with respect to female, but not male, applicants. The manager also instructed Gill not to send him female applicants "who did not have their childcare problems worked out." Moreover, the manager routinely rejected female applicants with children if other applicants were available.

Based on this clear evidence of sex discrimination, the appellate court remanded the case to the district court with instructions to enter an

injunction in the plaintiff's favor "against future, or continued, sex discrimination."[81] Yet, despite the blatant discrimination shown, King arguably would not be entitled to any such remedy or attorneys' fees under Price Waterhouse if TWA could show it would have made the same decision not to rehire her. TWA would thus be able to continue practices found to be discriminatory.

The Ninth Circuit in Ostroff v. Employment Exchange, Inc.,[82] also found liability for illegal sex discrimination in a mixed motive case. Here, the plaintiff, Miriam Ostroff, brought a Title VII action against an employment agency. Ostroff had called the agency about an advertised position as an executive secretary and received a curt reply that the job was already filled. Later that day, her husband called the agency and was told the job was still open and was invited to apply.

The appeals court held that Ostroff had proven discriminatory treatment, but remanded the case to the district court so that the defendant could have the opportunity to show that it wouldn't have hired plaintiff anyway because she did not have a college

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81 Id. at 260.

82 683 F.2d 302 (9th Cir. 1982).

degree.[83] Here, for discriminatory reasons, Ostroff was denied even the opportunity to apply for a job and the appeals court held that, at the least, an injunction should be "issued regardless of Ostroff's qualifications."[84] Price Waterhouse appears to invalidate this holding.

Finally, Nanty v. Barrows Co.,[85] involves another Ninth Circuit holding threatened by Price Waterhouse. In this case, Herbert Nanty, a Native American, was denied a job as a delivery truck driver. He applied in person for the job and was told it had already been filled, but he was never asked about his qualifications for the job. Had the employer done so, he would have found that Nanty had all of the necessary qualifications. Three days after Nanty had been turned away, two whites were hired for the job.

The court of appeals remanded the case to the district court with instructions to enter an injunction prohibiting the company from discriminating against Nanty again and to award Nanty attorneys' fees.[86] Because the company also argued that Nanty had not been

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83 Id. at 305.

84 Id. at 304.

85 660 F.2d 1327 (9th Cir. 1981).

86 Id. at 1334.

hired based on the job criteria of neatness, articulacy and personableness, the appeals court also instructed the district court to make a finding as to whether Nanty was entitled to a job given the subjective criteria upon which the company allegedly based its decision.[87] As a result of Price Waterhouse, the award of the injunction and attorneys' fees would apparently not be available if the district court found that the company would not have hired Nanty because, in the company's view, he was not neat, articulate, or personable.

After Price Waterhouse, it is unclear whether relief would be available to the plaintiffs in any of these cases despite the proven egregious discrimination. Under the literal language of Price Waterhouse, an employer who discriminates may escape liability altogether merely because it is able to show that it would have made the same employment decision.[88]

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87 Id.

88 In addition, because courts often look to Title VII case law in deciding cases brought under Title VIII, see, e.g., United States v. Hunter, 459 F.2d 205, 217-18 (4th Cir.) (citing Title VII employment cases), cert. denied, 409 U.S. 934 (1972), it is possible that Price Waterhouse may eventually erode the protections available in the housing discrimination area as well. Under current standards "[r]ace is an impermissible consideration in a real estate transaction, and it need only be established that race played some part in the refusal to deal." Moore v. Townsend, 525 F.2d 482, 485 (7th Cir. 1975). In adopting this standard, the Sixth Circuit Court of Appeals stated that "other circuits

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Martin v. Wilks

In Martin v. Wilks,[89] the Supreme Court ruled that persons not made a party to a consent decree in a Title VII case may at any later time challenge the consent decree in a separate lawsuit. The Court's holding rejected the overwhelming majority rule of the circuits that such collateral attacks are impermissible. The decision undermines the finality of a multitude of consent decrees, as well as court orders, in Title VII cases. Long resolved cases are now susceptible to challenge by persons who knowingly chose not to intervene in the litigation. The decision will thus substantially affect the ability to obtain stable and effective relief in Title VII cases.

According to Wilks, the only way to preclude a person "affected" by a consent decree from challenging the consent decree in a subsequent suit years later is

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have clearly and repeatedly found liability when race was only one factor, rather than the sole reason for refusal to sell." Green v. Century 21, 740 F.2d 460, 464 (6th Cir. 1984). Courts may well substitute the new Price Waterhouse Title VII standard for the current long-standing rule applied in housing discrimination cases.

[89] 109 S. Ct. 2180 (1989).

by mandatory joinder of that person as a party.[90] Thus, the burden is on existing parties to identify all those persons who may be affected by the consent decree and join them as parties, a procedural rule thought to be unworkable by 32 states, the Virgin Islands, and the District of Columbia.[91] The detrimental effect of Wilks has already been demonstrated in the lower courts.

A. The Decision in Martin v. Wilks

The events that led to Martin v. Wilks began in 1974 with a suit in federal court by black individuals and a branch of the NAACP against the city of Birmingham, Alabama, and the Jefferson County Personnel Board. Plaintiffs alleged racial discrimination in hiring and promotion practices in the city's fire department under Title VII and other federal law. After extensive negotiations and prior to trial, however, the parties were able to settle the suit through agreeing to certain consent decrees which included goals for hiring and promotion of black firefighters.

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90 Id. at 2185-86 (discussing Federal Rule of Civil Procedure 19).

91 Amicus brief for Alabama, Arkansas, California, Connecticut, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Rhode Island, South Carolina, Texas, Vermont, Virginia, West Virginia, Wisconsin, Wyoming, the District of Columbia and the Virgin Islands, Martin v. Wilks, 109 S. Ct. 2180 (1989).

Fourteen years after the consent decrees, however, white firefighters brought suit against the city and the Board alleging that they were being denied promotions which were being received by blacks as a result of reliance on the consent decrees. The district court, following the general rule of the circuits, held that the white firefighters were precluded from challenging decisions made in accordance with the prior consent decrees. The court of appeals reversed, however, and the Supreme Court affirmed. The Court held that non-parties to a consent decree could freely challenge employment decisions taken later in accordance with such consent decrees.

B. The Impact of Martin v. Wilks on Prior Case Law

It was a well accepted legal maxim prior to Martin v. Wilks that collateral attacks on consent decrees in Title VII cases were not permitted.[92] Circuit courts generally agreed that the uncertainty caused by the threat of inconsistent or contradictory proceedings "undermine[s] the concept of a final judgment and [violates] the policy of promoting settlement in Title VII actions."[93] Employees failing

[92] Dennison v. City of Los Angeles Dept. of Water and Power, 658 F.2d 694, 695 (9th Cir. 1981).

[93] Marino v. Ortiz, 806 F.2d 1144, 1146 (2d Cir. 1986), aff'd, 484 U.S. 301 (1988).

to timely intervene could not object to the implementation of consent decrees in the First, Second, Third, Fifth, Sixth, Seventh and Ninth Circuits.[94] Only the Eleventh Circuit in Wilks itself allowed employees failing to timely intervene to upset the finality of a consent decree by a later challenge, the position adopted by the Supreme Court in Wilks.[95]

C. The Impact of Martin v. Wilks in the Lower Courts

Lower courts and parties in employment discrimination cases are already feeling the impact of Wilks. Mann v. City of Albany, Ga.[96] illustrates the vulnerability of court decrees as a result of Wilks. After finding illegal discrimination in Albany, Georgia's hiring and employment patterns, a federal court decree was adopted in 1976 in Johnson v. City of

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94 See, e.g., Deveraux v. Geary, 765 F.2d 268 (1st Cir. 1985), cert. denied, 478 U.S. 1021 (1986); Marino v. Ortiz, 806 F.2d 1144 (2d Cir. 1986), aff'd by an equally divided court, 108 S. Ct. 586 (1988); Society Hill Civil Ass'n v. Harris, 632 F.2d 1045 (3rd Cir. 1980); Thaggard v. City of Jackson, 687 F.2d 66 (5th Cir. 1982), cert. denied, 454 U.S. 900 (1983); Stotts v. Memphis Fire Dep't., 679 F.2d 541 (6th Cir. 1982), rev'd on other grounds sub nom. Firefighters Local Unit No. 1784 v. Stotts, 467 U.S. 561 (1984); Burns v. Bd. of School Commissioners, 437 F.2d 1143 (7th Cir. 1971); Dennison v. City of Los Angeles Dep't. of Water and Power, 658 F.2d 694 (9th Cir. 1981).

95 In re Birmingham Reverse Discrimination Employment Litigation, 833 F.2d 1492 (11th Cir. 1987), aff'd sub nom. Martin v. Wilks, 109 S. Ct. 2180 (1989).

96 883 F.2d 999 (11th Cir. 1989).

Albany, Ga.[97] In 1985, a white employee who had not received a promotion sought to challenge the decree in a separate suit. The district court initially dismissed the challenge, noting that the plaintiff admitted that the black male who had received the job was in fact qualified and that the suit was an "isolated attack on a broad-sweeping plan which has been operating smoothly for several years."[98] After the Court's decision in Wilks, however, the court of appeals reversed and allowed the challenge to proceed.

Mann is the first in what promises to be a long line of cases permitting collateral attacks upon consent decrees and court decrees. Issues once thought finally litigated will be relitigated and relitigated.[99]

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[97] 413 F. Supp. 782 (M.D. Ga. 1976). The Johnson court found that the evidence was "more than sufficient" to establish a prima facie case of discriminatory employment practices by the city and its officials. Id. at 799. There was both actual and statistical evidence that black persons were hired into only the lowest paying, nonsupervisory jobs while skilled jobs were reserved for whites. Blacks were not paid equal wages for equal work and were not promoted. All appointed city officials were white, and employee facilities, restrooms, coffee pots, etc. were segregated by race. Id. at 799-800.

[98] Mann v. City of Albany, 687 F. Supp. 583, 588 n.6 (M.D. Ga. 1988).

[99] In addition to Mann, a number of other cases challenging employment discrimination decrees filed before the decision in Wilks will continue to be litigated as a result of Wilks. See, e.g., Henry v. City of Gadsden, Ala., 715 F. Supp. 1065 (N.D. Ala.
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A number of new "reverse discrimination" cases have already been filed in various localities in both state and federal courts in reliance upon Wilks. Although comprehensive statistics are not available, during the period of this study alone at least ten such challenges have been filed across the country, a rate of one every three weeks, and more are expected.[100]

For example, in Peterson v. Oakland,[101] a class of white and Hispanic male firefighter applicants brought suit pursuant to the decision in Martin v. Wilks, collaterally attacking a consent decree of May 1, 1986 in the case of Nero v. City of Oakland[102] on the

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1989) (rejecting on the merits challenge to consent decree in employment discrimination case); Jansen v. City of Cincinnati, No. C-1-89-079 (S.D. Ohio Feb. 6, 1989) (filing challenge to fifteen-year old consent decree in employment discrimination case).

100 Indeed, in late January, just after the period during which this study was conducted, four new challenges were filed, including one against the San Francisco Unified school district, one against the San Francisco community college district, and two against the city of Memphis concerning the police and fire departments, respectively. See Davis v. City and County of San Francisco, No. C-915348 (Cal. Super. Ct.) (removed to federal court and renumbered C-90-0286-TEH); Fowler v. City and County of San Francisco, No. C-915350 (Cal. Super. Ct.) (removed to federal court and renumbered C-90-0288-DLJ); Aiken v. City of Memphis, No. 90-2069 HA (W.D. Tenn. Jan. 23, 1990); Davis v. City of Memphis, No. 90-2068 HA (W. Penn. Jan. 23, 1990).

101 No. 92784 (N.D. Cal. July 27, 1989).

102 No. C35-8448-WHO (N.D. Cal. 1986).

grounds that it unlawfully discriminates against them on the basis of race and gender. This is despite the fact that over three years earlier, the court in Nero found that employment practices used by the city which led to the suit had a discriminatory impact on minorities and preliminarily enjoined their continued use.[103]

The effect of Martin v. Wilks has also been felt in San Francisco, California. In Ratti v. City and County of San Francisco,[104] white police officers claim race discrimination in the implementation of a consent decree approved ten years earlier in Officers for Justice v. Civil Service Comm'n of San Francisco.[105] This challenge also comes despite the fact that the court in Officers for Justice "issued preliminary orders finding the . . . selection practices and procedures for entry-level and Sergeant positions to be discriminatory

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103 On or about December 13, 1985, the court heard a motion for a preliminary injunction which resulted in this finding by the court. See Peterson v. City of Oakland, Cal., No. C-89-2784 (N.D. Cal., July 27, 1989).

104 No. C-89-3577-RFP (N.D. Cal. Jan. 12, 1990).

105 473 F. Supp. 801 (N.D. Cal. 1979), aff'd., 688 F.2d 615 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983). The case has been removed to the U.S. District Court for the Northern District of California. Although not expressly attacking the consent decree itself, plaintiffs allege defendant's conduct constitutes violations of the Government Code of California §§ 12900 et seq.; Article I, Section VIII of the California constitution; the Fourteenth Amendment of the United States Constitution; and 42 U.S.C. 1981 (1982).

and in violation of federal law."[106] Although the parties entered into the consent decree to "avoid the delay and expense of contested litigation,"[107] Wilks will allow disgruntled police officers to force relitigation of issues settled in Officers for Justice more than 10 years ago.

A parallel case is presently pending in state court on behalf of white male firefighters in San Francisco. In Van Pool v. City and County of San Francisco,[108] a class of white firefighters is challenging the implementation of a consent decree.[109] This consent decree was implemented to remedy discrimination against minorities by the City and the San Francisco fire department, and Martin v. Wilks allows a challenge to what was once thought a final determination of an appropriate remedy after a finding of discrimination against minorities.[110]

In addition to Wilks itself, there is yet another challenge as a result of Wilks in Alabama. In

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106 Officers for Justice, 473 F. Supp. at 809.

107 Id.

108 No. 903108 (Cal. Super. Ct. Nov. 21, 1989).

109 Davis v. San Francisco, 656 F. Supp. 276 (N.D. Cal. 1987).

110 The allegations in Van Pool parallel that in Ratti, however, the federal claims are omitted because the action is presently in state court.

Williams v. Bailey,[111] plaintiffs are white deputy sheriffs alleging race and sex discrimination against them because of promotion of blacks and women to sheriff's sergeant pursuant to a March 1983 consent decree with Jefferson County, Alabama entered in the Wilks litigation. Plaintiffs are white male employees of the Jefferson County sheriff's department who were not promoted to sergeant of the sheriff's department. Plaintiffs allege that hiring practices adopted as a result of the consent decree are illegal, although the consent decree was adopted to prevent further discrimination by the sheriff's department in the hiring and promoting of persons who are not white males.

Three separate collateral attacks on consent decrees are now pending in the city of Boston. In Stuart v. Roach,[112] 37 individually named plaintiffs are suing the city of Boston, its mayor, the commissioner of its police department and the director of personnel administration, all parties to a consent decree extended by the court on October 31, 1985 which provided for goals, timetables, and other relief with respect to appointments to the rank of sergeant. The white plaintiffs in Stuart allege legal violations because

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111 No. CV-89-PT-1241-S (N.D. Ala. July 19, 1989).

112 No. 89-2348-MC (D. Mass. Oct. 23, 1989).

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they were not promoted to the rank of sergeant. Plaintiffs demand a form of relief that would be in direct contravention of the goal of the consent decree, "to remove all vestiges of discrimination from the process of promoting police officers" in the city of Boston.[113]

Plaintiffs in Fagan v. City of Boston[114] are challenging a consent decree approved by a federal court in 1973 in response to claims of discrimination in the recruiting and hiring of Boston police.[115] That court found "that the proposed decree [was] just, reasonable, and in the public interest, and more likely than any other proposed solution to give the people of the Commonwealth of Massachusetts effective, non-discriminatory, dedicated, and honorable police forces."[116] In 1971, the court afforded "ample opportunity" for intervention, and all were allowed to intervene upon request.[117] The Attorney General, the

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113 Massachusetts Ass'n. of Afro-American Police, Inc. v. Boston Police Dept., 106 F.R.D. 80, 82 (D. Mass.), aff'd, 780 F.2d 5 (1st Cir. 1985), cert. denied, 478 U.S. 1020 (1986).

114 No. 89-2076-N (D. Mass. Sept. 21, 1989).

115 Castro v. Beecher, 365 F. Supp. 655 (D. Mass. 1973).

116 Id. at 660.

117 Id. at 656.

Massachusetts legislature, and some individuals reportedly contemplated intervention, but despite a "barrage of publicity" that "raised every possible real or fanciful objection," no one not already a party chose to intervene.[118] Approval of the consent decree came after extensive litigation and much publicity. Yet Wilks will allow disruption of a consent decree 16 years after it was entered and which has already been found to "[make] effective the guarantee in the United States Constitution of the equal protection of the laws."[119]

A parallel suit has been brought by Boston firefighters in Mackin v. The City of Boston[120] challenging the court decree in Boston Chapter, NAACP, Inc. v. Beecher.[121] After finding that plaintiffs had made a prima facie case showing discrimination in the use of certain entrance exams and that the defendants had failed to show job relationship of the examinations justifying their use, the lower court in Beecher ordered relief eliminating the discriminatory practices of the city with respect to hiring of persons for fire department positions and calling for goals and

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118 Id.

119 Castro, 365 F. Supp. at 660.

120 No. 89-2025-N (D. Mass. Sept. 14, 1989).

121 371 F. Supp. 507 (D. Mass.), aff'd, 504 F.2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975).

timetables to remedy past discrimination. The First Circuit affirmed, specifically rejecting contentions that the relief imposed by the District Court was unconstitutional and prohibited by Title VII. The court of appeals explained that the "relief imposed by the district court . . . [went] no further than to eliminate the lingering effects of previous practices that bore more heavily than was warranted on minorities."[122] The court also found Title VII was not violated since relief undertaken in order to redress past discrimination is permitted.[123] Thus, after specific findings of the First Circuit in 1974 that the decree entered by the district court earlier in the year was both constitutional and did not violate Title VII, Wilks allows plaintiff firefighters to relitigate issues decided on their merits over 15 years earlier.

In Ohio, as a result of Wilks, litigation commenced over 17 years ago, and resolved one year later in a consent decree, will be relitigated. In Bembenek v. Winkle,[124] the district court determined that the goal of a 1974 consent decree -- complete

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122 Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017, 1027 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975).

123 Id. at 1028.

124 No. 3:90CV7016 (N.D. Ohio Jan. 17, 1990).

integration of the Toledo police and fire divisions -- had not been met. The court ordered the hiring of all qualified minority applicants for a class of firefighter trainees in order to "send a strong message . . . to the entire [Toledo] community."[125] In January, 1990, 30 non-minority firefighters, relying upon Wilks, brought suit challenging the actions taken pursuant to the August 1989 court order, although the hiring of minority applicants was determined to be necessary so that the goal of the 1974 consent decree could be achieved.

Vogel v. City of Cincinnati[126] challenges a 1981 consent decree, the purpose and intent of which was to "insure that blacks and women are not disadvantaged by the hiring, promotion, assignment and other employment policies and practices of the [Cincinnati Police Division]."[127] Wilks sanctions this challenge to a consent decree over eight years old despite the fact that the consent decree was entered into in part "to avoid protracted and unnecessary litigation."[128]

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125 Brown v. Winkle, Case No. C 72-282, (N.D. Ohio Aug. 21, 1989) (Memorandum and Order of Judge Young).

126 No. C-1-89-683 (S.D. Ohio Nov. 14, 1989).

127 United States v. City of Cincinnati, Ohio, No. C-1-80-369, slip op. at 3 (S.D. Ohio Aug. 13, 1981) (consent decree).

128 Id.

During the period of this study, a lawsuit was also filed challenging consent decrees in Memphis, Tennessee. In Ashton v. City of Memphis, No. 97640-3 (Chancery Ct. Aug. 28, 1989) (removed to federal court and renumbered 89-2863 HA), a group of white police employees effectively challenged promotion procedures resulting from consent decrees in employment discrimination suits filed in the 1970s. See United States v. City of Memphis, No. C-74-286, and Afro-American Police Ass'n. v. City of Memphis, No. C-75-380.

D. The Overall Effect of Wilks

Wilks has opened to challenge consent decrees and court orders once thought final in cities all over the country. First to be subject to the Wilks attack will be court approved decrees that resulted from lawsuits alleging employment discrimination.[129] Dennis Lynch, a University of Miami School of Law professor, has noted that Wilks "opens up the door to a ton of litigation" with people "filing lawsuits like crazy."[130]

The implications of Wilks are not limited to the public sector. Consent decrees entered into by corporate employers are also now subject to challenge.

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129 News and Sun-Sentinel, June 18, 1989, at 1A.

130 Id.

There are 32 such consent decrees in Illinois alone, the finality of which is now uncertain.[131]

Furthermore, Wilks may significantly discourage employers and employees from settling discrimination grievances without going to trial because employers must show that all parties were invited to join in the agreement. This would be difficult, perhaps impossible, as to unspecified future employees. As Sue Meisinger, vice president of the American Association of Personnel Administration, has predicted, the result may well be to cause employees to "go all the way through the litigation process" in many cases which could otherwise be settled.[132] As a result of Wilks, EEOC attorney John Rowe has commented, there is no incentive to "buy peace" through settlement because the peace bought by entering into a consent decree is so easily disrupted.[133] Wilks will thus significantly discourage settlement as well as disrupting already resolved litigation, contrary to the intent of the Congress in enacting Title VII.[134]

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131 Chicago Tribune, June 20, 1989.

132 Id.

133 Id.

134 See Carson v. American Brands, 450 U.S. 79, 88 n.14 (1981) (noting Congress' "strong preference for encouraging voluntary settlement" of Title VII claims).

E. Conclusion

In its 1989 Title VII decisions, the Supreme Court undid much of what the Congress, the Burger Court and the lower federal courts had done to end discrimination in employment through enforcement of Title VII of the Civil Rights Act. The 1989 decisions make it far more difficult for employees to prove discrimination and obtain relief for discrimination in court. The decisions make it far easier for employers to defend discrimination cases, and far easier for non-minorities to challenge consent decrees which settled discrimination cases.

The Personnel Board of Jefferson County, Alabama

301 COURTHOUSE ANNEX

BIRMINGHAM, ALABAMA 35263-0029

JAMES B. JOHNSON, Chairman
PATRICIA A. HOBAN-MOORE, Associate
RODERICK BEDDOW, JR., Associate

DAVID T. GRAF,
Director of Personnel

March 12, 1990

Honorable Edward M. Kennedy
Senator, Massachusetts
Chairman, Committee on
Labor and Human Resources
SD-428 Dirksen Building
Washington, D. C. 20510-6300

Dear Senator Kennedy:

We would respectfully request that the following statement be entered as testimony on behalf of the Jefferson County Personnel Board, Defendants in Martin v. Wilks, 110 S.Ct. 11, 106 L. Ed. 2d. 626 (1989), in connection with the hearings held before this Committee on Wednesday, March 17, 1990, on the Civil Rights Act of 1990.

We wholeheartedly support the passage of the Civil Rights Act of 1990.

The Jefferson County Personnel Board has deep immediate concerns about the impact of the decision by the United States Supreme Court in the Martin v. Wilks case.

The key provision of the Act which is of dire necessity to the Personnel Board is Section 6. **Facilitating Prompt and Orderly Resolution of Challenges to Employment Practices Implementing Litigated or Consent Judgment on Orders.**

Since the decision in Martin v. Wilks, we have sustained new lawsuits in Federal Court, and charges filed with the United States Equal Employment Opportunity Commission seeking a collateral attack on the Consent Decree litigated in Martin v. Wilks and originally entered in U.S. v. Jefferson County, et al. 28 FEP Cases 1834 (ND Ala. 1981), Affirmed, 720 F 2d. 1511 (CA 11, 1983).

Under Martin v. Wilks, a defendant in a class action Title VII lawsuit, must endeavor to bring to the settlement table all represented class members and all potentially

affected interests of non-class members. Martin v. Wilks sets a standard with no end. It is impossible to know all potentially affected interests of non-class members in a society growing ever more culturally and racially diverse.

The prospects are that since we serve over 23 jurisdictions, including the City of Birmingham, and Jefferson County, we could be sued by employees in each of them, and be forced to defend numerous times, the Consent Decree in U.S. v. Jefferson County. This would result in cost prohibitive litigation, of a singular issue which, under the terms of the Martin v. Wilks decision, has no resolve.

We urge adoption of Section 6, and the Civil Rights Act of 1990.

Sincerely,

James B. Johnson

Roderick Beddow

Patricia Hoban-Moore

Patricia Hoban-Moore

/bnh

PREPARED STATEMENT OF THE AMERICAN CIVIL LIBERTIES UNION NORMAN DORSEN, PRESIDENT

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to present the views of the American Civil Liberties Union (ACLU) concerning S. 2104, the Civil Rights Act of 1990. The ACLU is a nationwide, non-partisan organization of more than 275,000 members devoted solely to protecting the rights and liberties guaranteed by the Constitution.

By way of background, I am a lawyer admitted to practice in New York State, the District of Columbia, and other federal courts including the Supreme Court of the United States. Before entering the private practice of law, I served as law clerk to Chief Judge Calvert Magruder of the U.S. Court of Appeals for the First Circuit and for Justice John Marshall Harlan of the U.S. Supreme Court. Since 1961, I have been a member of the faculty of New York University Law School, where I am now Stokes Professor of Law. In 1964-66 I was reporter-draftsman of the Model Anti-Discrimination Act for the National Conference of Commissioners on Uniform State Laws. I have been a visiting professor and have lectured at many other law schools, including Harvard, Texas, Michigan, Georgetown, and the University of California at Berkeley. I was the President of the Society of American Law Teachers from 1973-75.

I am and have been since 1976 the president of the American Civil Liberties Union. I appear before you today in support of the Civil Rights Act of 1990.

Introduction

> "One wonders whether the majority still believes that [discrimination] is a problem in our society, or even remembers that it ever was."[1/]

In 1989, the Supreme Court dealt a series of crippling blows to the statutory framework of established civil rights laws and, in the process, sent the struggle for equality in the American workforce plummeting. The Court's decisions reversed time-honored judicial precedents under two of the most important laws that Congress has enacted to provide opportunities that were historically denied to racial and ethnic and religious minorities and women.

One of the statutes affected by a Court decision last term is the Civil Rights Act of 1866. Section 1981 of Chapter 42 of the U.S. Code[2/] has been robbed of much of its modern vitality as a result of the Supreme Court's decision in Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989). Congress enacted the Civil Rights Act of 1866 in response to post-Emancipation legal and extra-legal efforts to oppress "freedmen", and intended the legislation "give effect to th[e Thirteenth Amendment] and to secure to all persons within the United States practical

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[1/] Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989) (Blackmun, J., dissenting, joined by Brennan, J. and Marshall, J.).

[2/] 42 U.S.C. § 1981 was derived from § 1 of the 1866 Civil Rights Act, 14 Stat. 27, which was re-enacted with minor changes as § 16 of the Civil Rights Act of 1870, 16 Stat. 144. See Runyon v. McCrary, 427 U.S. 160, 168-70 and n.8 (1976); see also, Jones v. Alfred H. Mayer Co., 392 U.S. 409, 423 (1968).

freedom."[3/] The right to "make and enforce" contracts, which governs the employment relationship, is meaningless if that right is constricted through judicial interpretation to exclude the enjoyment of a workplace free of racial harassment.

The Civil Rights Act of 1990 corrects the Patterson holding by expressly defining the right "to make and enforce contracts" to include the making, performance, modification, and termination of contracts, including the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

By reaffirming the broad scope of Section 1981, Congress ensures that individuals have the same rights with respect to employment and other contracts regardless of race. An employer who is prohibited from discriminating against African Americans at the time of hiring should similarly be prohibited from harassing African American employees a week after they start working.

The other federal statute whose interpretation suffered a grievous blow was Title VII of the Civil Rights Act of 1964. Title VII and the Voting Rights Act of 1965 are the most significant and effective civil rights legislation enacted by Congress in this century. The importance of Title VII in promoting workplace equality for racial minorities and women derives largely from judicial interpretations which have made it

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[3/] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 431 (1968) (quoting Cong. Globe 39th Cong. 1st Sess. at 474) (Remarks of Senator Trumbull).

possible to remedy not only acts of intentional discrimination, but also the subtler and more arbitrary forms of decisionmaking which have had an adverse impact on women and minorities seeking employment.

Regrettably, Title VII has been impaired through the Court's restricted view of congressional intent and through a reversal of its own established precedents. For example, the Court .. overturned an 18-year-old landmark decision[4/] that has been used successfully to eliminate unnecessary barriers to equal employment opportunity. In Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989), the Court ruled 5-4 that an employer no longer bears the burden of demonstrating the business necessity of practices that tend to affect adversely the employment opportunities of individuals based on their race, color, religion, sex, or national origin; and that victims in such cases must isolate the precise factors that caused the discriminatory impact, even though it may be impossible to do so.

The The Civil Rights Act of 1990 corrects Wards Cove by prohibiting facially neutral employment practices that have a tendency to affect adversely the employment opportunities of individuals on the basis of race, sex, color, religion or national origin. It provides that upon a showing by the plaintiff of this effect, the burden of proof shifts to the

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[4/] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

employer to prove business necessity if it is essential to effective job performance.

In Lorance v. AT&T Technologies Inc., 109 S. Ct. 2261 (1989), the Court required employees to anticipate future adverse applications of the seniority system in question no matter how speculative or unlikely the application might be and long before it had direct impact on its potential victims. To avoid the adverse consequence of the statute of limitations governing such actions, the employers were required to initiate suit on that basis. Short of such action by employees, the Court's decision insulates employers from liability for facially neutral seniority systems which have discriminatory effects that are not immediately felt.

Section 7 of S. 2104 would reverse the Lorance result, re-establishing that the statute of limitations period for challenging employment practices generally does not commence until the concrete effects of the injury are felt by the charging party. Accordingly, employees who must challenge employment practices within seniority systems can do so at a realistic point in time. Seniority systems adopted with an intent to discriminate may be challenged provided that they are challenged during the life of the collective bargaining agreement.

The Bush Administration has indicated its support for legislation to overturn the Court's decisions in Patterson and Lorance. However, the Administration's proposal falls far short.

Additional measures like those embodied in S. 2104 are necessary to achieve the national objective of a fair workplace.

The Civil Rights Act of 1990 is proof that this Congress recognizes the reality of discrimination in America's workplace. The legislation before us restores the scope and effectiveness of federal civil rights laws. It also addresses anomalies that are found in our existing fair employment laws.

The Civil Rights Act of 1990 is necessarily a broad remedy to many different ills in our present employment laws, or more pointedly, in the Supreme Court's interpretation of those laws. Each section of the bill is designed to create tangible, undeniably positive results in the struggle for equality in the workplace. It is for this reason that I submit this endorsement of the bill on behalf of the American Civil Liberties Union.

The Role of Congress in Protecting Civil Rights

Some opponents of S. 2104 have argued that it is improper for Congress to enact legislation that would effectively overrule various Supreme Court decisions. I believe that this argument lacks merit. It is entirely appropriate for Congress to correct erroneous readings of legislative intent by the Supreme Court. This is especially true in the civil rights area where Section 5 of the Fourteenth Amendment grants Congress express authority to adopt appropriate legislation to enforce the Amendment's provisions.

Obviously, the interplay between statutory and constitutional considerations is important. For example, a statute protecting minority interests might conflict with Fourteenth Amendment notions of equal protection, and the Court may act to bring the statute and the Amendment into harmony.[2/]

However, the Court's decisions at issue in H. R. 4000 do not involve interpretations of the Constitution. Instead the legislation involves little more than a congressional response to restrictive judicial interpretations of federal statutes that are wholly within the purview of Congress to enact. In the face of decisions which deprive the laws of their practical effectiveness, it is most appropriate for Congress to revisit the enforcement practices which provided for comprehensive coverage of the anti- discrimination laws.

Congress has corrected judicial misreading of the intent of civil rights laws on previous occasions. Most recently, Congress rejected the reasoning of Grove City v. Bell, 465 U. S. 55 (1984). In that case, the Court held that only the particular program within an institution receiving federal financial assistance had to comply with the civil rights laws. Other programs and the institution as a whole did not have to comply with the civil rights laws. The Congress passed the Civil Rights

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[2/] See, City of Richmond v. J. A. Croson Co., 109 S. Ct. 706 (1989). It should also be noted that the ACLU has joined several national civil rights organizations in the formation of the "Joint Project to Preserve Minority Business Opportunity" to explore the possibility of a separate legislative response to the Croson decision.

Restoration Act of 1987 (P. L. 100-259), overriding a veto, mandating institution-wide coverage.

Another important example of congressional leadership in the area of civil rights involved the decision in General Electric v. Gilbert, 429 U. S. 125 (1976) which held that an employer's health insurance policy which excluded pregnancy coverage did not constitute discrimination based on sex, although the EEOC had promulgated regulations to the contrary. Congress passed the Pregnancy Discrimination Act (P. L. 95-555) which said that discrimination on the basis of sex included discrimination because of pregnancy or childbirth. I note that in this instance all three branches of government had an opportunity to act on an important social question, with the congressional action being the final and decisive one.

Congress has also acted in the area of voting rights. In the case of City of Mobile v. Bolden, 466 U.S. 55 (1980), the Supreme Court held that an at large election scheme which had deprived black voters of representation did not violate the Voting Rights Act. Two years later, the Congress explicitly amended the Voting Rights Act to cover the City of Mobile v. Bolden fact pattern, by enacting the Voting Rights Act Amendments of 1982 (P. L. 97-205).

In 1986, Congress overturned two Supreme Court decisions which limited the rights of the disabled contrary to congressional intent. In Atascadero State Hospital v. Scanlon, 473 U. S.734 (1985), the Court ruled that money damages could not

be awarded against a state agency which violated Section 504 of the Rehabilitation Act of 1973. The Congress amended that act to ensure that injured parties could recover from state agencies, see The Rehabilitation Act Amendments of 1986 (P. L. 99-506). Similarly, the Handicapped Children's Protection Act of 1986 (P. L.99-372) overturned the holding in Smith v. Robinson, 468 U.S.2 (1984) that the Education of the Handicapped Act had repealed by implication rights created by earlier statutes.

It is clear that Congress not only has the right, but that it has the responsibility to reverse the Supreme Court's decisions which misread congressional intent so fundamentally.

Discussion of Other Provisions of S. 2104

In addition to the Patterson, Lorance, and Wards Cove decisions, the Civil Rights Act of 1990 addresses other Supreme Court rulings which restrict or modify the reach of equal employment opportunity laws[6/]. For example, Price Waterhouse v. Hopkins, 109 S. Ct 1775 (1989), illustrates the Court's shift away from full protection against discrimination.

In Price Waterhouse a plurality of four justices adopted a new rule of causation in analyzing so-called "mixed motive" cases: once a plaintiff shows that discrimination is a motivating factor in an adverse employment decision, the employer

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[6/]See also, Martin v. Wilks, 109 S. Ct. 2180 (1989) and Independent Federation of Flight Attendants v. Zipes, 109 S. Ct. 2732 (1989).

can nonetheless escape liability by proving with preponderance of evidence that the same decisions would have been made notwithstanding the discriminatory factor. The effect of this ruling is to insulate previously unlawful action and to foster the implication that federal laws may, under some circumstances, tolerate intentional discrimination.

The Civil Rights Act of 1990 makes clear that actions for which discrimination is a motivating factor are violations of Title VII. However, this bill also provides that a court may not grant a remedy under Section 706(g) of Title VII that places an aggrieved individual in a better position regarding hiring, firing or promotion than he/she would have been absent the impermissible motivating factor. For example, S. 2104 wisely provides that if an employer would have fired the individual even without the improper motivating factor, a court may not order the reinstatement of the employee. This bill sends a necessary message to the courts that a "little bit" of discrimination is still wrong.

The Civil Rights Act of 1990 also amends the remedies provision of Title VII to provide for monetary damages in cases of intentional discrimination. However, this provision would exclude these remedies for violations based solely on proof of disparate impact. This section of the bill resolves an anomaly in fair employment law which permits these remedies for cases of racial discrimination, but denies them to women and others not

covered under Section 1981 of 42 U.S.C. The provision expressly provides for a jury trial where damages are sought.

Wards Cove v. Atonio

I will now turn my attention more specifically to the Court's decision in Wards Cove. This decision, which may be the most damaging of the Court's recent civil rights rulings, has been greatly misunderstood by some critics of S. 2104. As this Committee knows well, the Wards Cove decision has potentially far-reaching implications for the rights secured by Title VII. If left unchanged by subsequent act of Congress, the Wards Cove decision will seriously undermine the ability of any worker subjected to discriminatory employment practices to receive the remedy Congress intended.

The facts of the Wards Cove case are particularly compelling and worthy of a brief review by the Committee. The Wards Cove case began as a class action lawsuit filed in 1974 alleging employment practices that, individually and in combination, created a patently racially stratified work environment at three Alaska salmon canneries. Among the elements contributing to this discriminatory result were (1) a history of job segregation; (2) recruitment practices which targeted non-whites for lower-paying jobs, while applicants for better jobs were sought from a predominantly white labor force; (3) rehire preferences, word-of-mouth hiring, and nepotistic practices; (4) subjective hiring practices; (5) racial segregation in the provision of housing and

meals; and (6) common use of overt racial designations and characterizations.

The evidence presented to the trial court in Wards Cove revealed that non-whites were heavily concentrated in lower-paying cannery jobs, and whites predominated in the higher-paying positions. For example, at Bumble Bee Cannery, which was one of the companies whose employment practices were in dispute, more than 90% of all hires over a nine year period in seven of twelve of its departments were white[7]. The same kind of racial stratification was also evident at Red Salmon Cannery -- whites obtained more than 75% of the jobs in nine of twelve departments. Non-whites filled the majority of the laborer and cannery worker positions[8].

Even within apparently "integrated" departments, there was compelling evidence of racial job segregation. For example, at Bumble Bee, in the Fish House and Cannery departments, "butcher and slimer" jobs were filled exclusively by non-whites, and "filler feeder and retort" jobs were held almost exclusively by whites.

The evidence of racially discriminatory hiring patterns within the cannery industry should have come as no surprise. The industry had traditionally employed non-white laborers for the

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[7]/Joint Excerpt of Record (hereinafter "ER") at 35.

[8]/ER at 36.

hardest, least lucrative positions -- a pattern that persisted well past the enactment of Title VII.

The recruitment practices at issue in this case are particularly instructive. Non-whites were recruited specially for cannery work, although there is no apparent reason why the employers in question did not make the full range of employment opportunities available to all potential applicants. Undoubtedly, many of the native Alaskans and Filipino workers recruited for cannery work would have preferred other jobs, especially since the pay and working conditions were better. But the preferred jobs were not offered, and inquiries about the availability of other positions were met by a variety of evasive responses[9/] Overt discrimination was evident also in the housing and meals arrangements and in the race-typing of jobs and workers.

Many of the employment practices at issue in Wards Cove have changed little since the days when the cannery owners apparently openly embraced and espoused race-based practices[10/]. Originally shaped by intentionally discriminatory practices, the system challenged in Wards Cove incorporated elements of intentional

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[9/]For example, recruiters at Alaskan villages in the remote areas near the canneries were not authorized to accept applications for non-cannery work, Joint Appendix (hereafter "JA") at 163; and non-whites were actively discouraged from applying. JA 38-42; 52; 56-60; 63-67; 71-73;75-77; 85-86; 125-126.

[10/]See, Sue Liljeblad, "Filipino Alaska: A Heritage" (1980) (Alaska Historical Commission Studies in History No. 9).

discrimination along with identifiable neutral practices applied alike to whites and non-whites, which served to maintain the status quo.

The record in Wards Cove is replete with evidence that the challenged employment practices operated to freeze historical patterns of racial discrimination[11/]. This case recalls an earlier era of Title VII enforcement when race and sex typing in employment was rampant, often overt and institutionalized. Although the law has developed to address more sophisticated and subtle forms of discrimination, there is nothing subtle about this case.

As a preliminary matter, two important points must be made. First, it is a difficult and complicated matter to establish a prima facie case under disparate impact theory as elaborated in Griggs v. Duke Power Co., 401 U.S. 424 (1971). Nothing in S. 2104 would ease this difficulty. Second, the judicial rules and definitions established in Griggs, refined in Albermarle Paper Co. v Moody, 422 U.S. 405 (1985), and reaffirmed in Connecticut v. Teal, 457 U.S. 440 (1982), should have governed the disposition of Wards Cove, which would have compelled the conclusion that the employers at issue had failed to rebut the dramatic evidence of discrimination or to demonstrate that their practices were justifiable. Third, that principles of stare decisis should have precluded the result which is now the subject

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[11/] See Griggs v. Duke Power Co., 401 U.S. 424 (1971), Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975).

of today's hearing. In my view the Court should have affirmed its long-standing rule that practices "fair in form, but discriminatory in operation"[12/] are unlawful unless affirmatively justified by the employer as necessary to the successful operation of the business.

Justification for the "Business Necessity" Definition

The Wards Cove decision severely undermined the existence of the "disparate impact" theory as a method for challenging employment discrimination thereby effectively overruling its landmark decision in Griggs. Among other things, the decision weakened the Court's earlier definition of "business necessity." As a result of this relaxed standard, courts will now excuse employer practices that unnecessarily harm the employment opportunities of minorities and women. See, e.g., Evans v. Evanston, 881 F.2d 383 (7th Cir. 1989) (reversing a district court's holding that a fire department had not shown that a cut-off requirement for physical agility test that tended to exclude women candidates was necessary).

In fact, the Wards Cove majority weakened the definition of "business necessity," to the point of eliminating, despite its express terms, any necessity requirement. In that decision, the Supreme Court set forth what the employer must show: "the dispositive issue is whether a challenged practice serves, in a

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[12/] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

significant way, the legitimate employment goals of the employer." 109 S. Ct. at 2125. The Court elaborated: while "a mere insubstantial justification" would not suffice, "there is no requirement that the challenged practice be "essential" or "indispensable" to the employer's business." Id. at 2126. A necessity requirement, the Court argued, would be almost impossible for most employers to meet, and would result in quota systems. Id.

Four members of the court vigorously disagreed. Justice Steven's dissent, with whom Justice Brennan, Marshall and Blackmun joined, emphasized the weighty burden on the employer. Id. at 2132. The dissent quoted from Dothard v. Rawlinson, 433 U.S. 321 (1977), and its formulation of business necessity, "essential to effective job performance," expressing astonishment that the Court would reject prior statutory construction. Id.

The Wards Cove Court's definition of business necessity negates the term on its face. The Court rejects the notion of necessity in repudiating the requirement for its synonyms: essential or indispensable. Instead it replaces business necessity with the broader concept of business justification.

The Wards Cove standard of "business justification" repudiates the reasoning of the Griggs decision and its recognition of the disparate impact theory. Griggs rejected the notion of mere business justification and imposed a tougher standard. In Griggs, the Court reversed the lower court's holding that a high school diploma need not be job related. The

Court of Appeals had merely required that there "must be a genuine business purpose in establishing such requirements." Griggs v. Duke Power Co., 420 F.2d 1225, 1235 n.8 (4th Cir. 1970).

Most importantly, case law does not support the Wards Cove Court's assertion that a business necessity requirement would encourage employers to adopt quota systems. Neither the Wards Cove opinion nor the Watson decision, Watson v. Fort Worth Bank & Trust Co., 108 S. Ct. 2777 (1988), quoted in reliance by the Wards Cove Court, 109 S. Ct. at 2122, offers a single case involving quotas based on percentages of population and prohibited by Title VII. See 42 U.S.C. Sec. 2000(e)-2(j) (1982).

Moreover, employers have been able to defend successfully against disparate impact claims under the business necessity standard, where the challenged requirement was in fact shown to be required for successful job performance. See, e.g., Richardson v. Hotel Corp. of America, 332 F. Supp. 519 (E.D. La. 1971) (absence of property related criminal convictions necessary qualification for hotel bellhop), aff'd mem., 468 F.2d 951 (5th Cir. 1972). Gillespie v. State Dep't of Health & Social Services, 771 F.2d 1035 (7th Cir. 1985)(essay test for position of personnel specialist/manager was job-related despite disparate impact on minorities); Zahorik v. Cornell Univ., 729 F.2d 85, 96 (2d Cir. 1984)(selection criteria for tenured faculty, prior accomplishments and skills in scholarship and teaching upheld as job related despite any disparate impact on women); Boyd v. Ozark

Air Lines, Inc., 568 F.2d 50, 54 (8th Cir. 1977)(upholding 5' 5" minimum height requirement for position in airline pilot training class despite disparate impact on women); Coopersmith v. Roudebush, 517 F.2d 818 (D.C. Cir. 1975)(test requiring applicants for attorney positions to write sample legal opinion upheld despite any disparate impact on women); United States v. Buffalo, 457 F. Supp. 612 (W.D. N.Y. 1978)(high school diploma requirement upheld for police patrol officer position despite adverse impact on blacks); Smith v. St. Louis San Francisco Ry. Co., 397 F. Supp. 580, 586 (D.C. Ala. 1975)(general clerical test justified by business necessity despite any discriminatory impact on blacks); James v. Stockham Valves & Fittings Co., 394 F. Supp. 434 (D.C. Ala. 1975)(aptitude tests used by valve manufacturers found sufficiently related to successful job performance despite any disparate impact on black applicant).

Appended to this statement is a report entitled "Impact of the Supreme Court's Decision in Wards Cove v. Atonio," which was prepared by ACLU staff. I ask that this report be considered as part of my testimony, and submit it for the record. The report looks at employment discrimination before Wards Cove, analyzes the changes mandated by that decision, and concludes that Wards Cove undermines the possibility of achieving equal employment opportunity and threatens to resegregate our workplaces.

Conclusion

Few Americans would wish a return to the nation as it existed prior to Brown v. Board of Education, 347 U.S. 483 (1954). Similarly, most Americans desire a society that is free of discrimination based on gender. In the last forty years, our nation has advanced in eliminating the scourges of prejudice. Indeed, these advances -- achieved through governmental action of the executive, legislation and judicial branches, as well steps taken by ordinary citizens -- are some of the most glorious accomplishments in American history.

Regrettably, at the start of the last decade of the 20th century, the Supreme Court is leading the retreat from these important and hard won victories. At a time when the doors of freedom are opening throughout the world, we must not allow a backward-looking Supreme Court to close the door on the possibility of a discrimination free workplace. Swift passage of the Civil Rights Act of 1990 is in keeping with the national consensus for equal opportunity regardless of race, gender or religious belief.

IMPACT OF THE SUPREME COURT'S DECISION IN WARDS COVE V. ATONIO
A REPORT BY THE AMERICAN CIVIL LIBERTIES UNION

INTRODUCTION

Last June, the United States Supreme Court tore down a carefully constructed legal structure designed to eliminate arbitrary barriers to employment opportunities for minorities and women. In Wards Cove Packing Co. v. Atonio, a 5-4 majority of the Court effectively reversed Griggs v. Duke Power Co., a landmark opinion written by Chief Justice Burger and decided by a unanimous Court eighteen years ago. In Griggs, the Court held that if facially-neutral employment practices have the effect of disproportionately excluding minorities or women, employers who adopt such job requirements must show that they are required by business necessity, i.e., that they "measure the person for the job and not the person in the abstract."

Wards Cove changed Title VII disparate impact law as it was applied from Griggs in three major respects. First, it made plaintiffs' prima facie case more difficult, in many instances completely impossible, to establish. Second, it shifted the burden of proof on the question of business necessity from the defendant to the plaintiff. Third, it significantly diluted the definition of business necessity to a minimal level of reasonable business justification. The net effect of these changes is to deny plaintiffs the realistic ability to challenge systematic, albeit non-intentional discrimination in the workplace.

Griggs and its progeny represented a fair and reasonable allocation of litigation burdens between plaintiffs and employers that it worked well for 18 years. The Wards Cove case, thus, "fixed something that wasn't broken."[1/] Indeed, women and minorities have successfully used Griggs and the disparate impact theory to help transform America's once.

[1/] Testimony of Norman Dorsen, President of the American Civil Liberties Union, before the House Committee on Education and Labor and the Committee on Judiciary, Sub-Committee on Civil and Constitutional Rights, Feb. 27, 1990.

segregated work places into integrated ones, which offer equal employment opportunities regardless of race, color, religion, sex, or national origin.

Moreover, employers themselves, by designing selection procedures that accurately reflect good job performance, have benefitted by broadening the pool of candidates without compromising quality. The disparate impact theory as applied in pre-Wards Cove cases did not lead employers to impose quotas. Opponents of this legislation cannot point to a single instance of that occurring. Employers were able to prevail before (see below, p.15) and they will continue to be able to prevail under the Civil Rights Act of 1990. What the proposed legislation will do is to return us to a climate (interrupted by Wards Cove and the other recent Supreme Court decisions) in which the problem of employment discrimination is taken seriously and in which employers have the incentive not to impose quotas but to review their employee hiring, promotion, and other employment practices to insure that paractices which disproportionately exclude women and minorities are required by business necessity.

I. THE PRIMA FACIE CASE: THE CAUSATION OR DISAGGREGATION REQUIREMENT

The Wards Cove decision severely undermined the very basis for making a prima facie disparate impact case under Title VII. The Court created a hurdle for plaintiffs which has been variously referred to as the "causation" requirement or the "disaggregation" requirement. Announced for the first time by a majority of the Supreme Court in Wards Cove, this approach holds that the plaintiff in a Title VII disparate impact case has the burden of isolating the specific employment practice, possibly in a series or group of practices, which is causing exclusion of the protected group. 109 S.Ct. at 2124-25.

A. Individual Practices - Problems of Proof.

1. Devices May Not Be Differentiated.

Prior to Wards Cove, the Supreme Court had never held that the plaintiff in a disparate impact case had the burden of isolating a specific practice or practices to prove that a selection process had a disparate impact on a protected group. (This position was foreshadowed in dicta by the plurality in Watson v. Ft. Worth Bank and Trust, 487 U.S. __, 101 L Ed. 2d 827 (1988)). Instead, because the thrust of Title VII was directed to the consequences of employment practices, the Court focussed on the cumulative effects of an employer's selection practices. See e.g., Griggs, 401 U.S. at, 432 (1971).

The lower courts were split, however, on whether disparate impact analysis could be applied to overall selection processes or whether individual components had to be isolated by the employee.[2/] In those circuits which held that the employee had to identify the

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[2/] Compare AFSCME v State of Washington, 770 F.2d 1401, 1405 (9th Cir. 1985); Talley v. United States Postal Service, 720 F.2d 505, 506-7 (8th Cir. 1983), cert. denied, 466 U.S. 952 (1984); E.E.O.C. v. Federal Reserve Bank, 698 F.2d 633, 639 (4th Cir. 1983); Pouncey v. Prudential Insurance Co., 668 F.2d 795, 800 (5th Cir. 1982); Green v. USX Corp., 843 F.2d 1511, 1516-17 (3rd Cir. 1988); Griffin v. Carlin, 755 F.2d 1516, 1523-25 (11th Cir. 1985); Segar v. Smith, 738 F.2d 1249, 1267 (D.C. Cir.1984), cert. denied sub nom.

specific practice causing the disparate impact, the courts reasoned that it was unfair to place on the employer the burden of defending each of the criteria that it uses. Other circuits disagreed, Congress did not intend to exempt those practices in which the adverse impact was caused by the interaction of two or more specific practices.[3/] For example, employers could simply refuse to be pinned down as to the selection criteria they employed, see Green v. United States Steel Corp., 570 F.Supp. 255, 274 (1983), or they could structure hiring and promotion systems to contain enough subjective criteria so that discrimination cannot be proved. In such situations, employees would be required to sift through layers of bureaucracy in order to determine precisely the component that had resulted in the disparate impact -- even though employers have better access and opportunity than do plaintiffs to critically evaluate the interrelationship of criteria used in hiring. Finally, since employment practices and subjective selection criteria are more likely to be multi-faceted for upper level than non-skilled positions, failure to apply the disparate impact model to multi-component practices would particularly insulate upper level employment systems. Without ever granting certiori on this specific issue, the Court in Wards Cove held that the overall race-or sex-based effect of challenged practices could be ignored unless an employee could show the impact of each particular employment practice and how it "caused" discrimination. 109 S.Ct. at 2124.[4/] Plaintiffs may now not be able to establish a prima facie

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Meese v. Segar, 471 U.S. 1115 (1985).

[3/] Griffin, 755 F.2d at 1525; Green, 843 F.2d at 1522-23 ("Disparate impact analysis is best understood as a burden-shifting device that fairly and reasonably apportions the burdens of proof between parties in a manner that is best suited to achieve the desired goals of Title VII -- whether the case presents a challenge to a single criterion or to several").

[4/] Conceptually, the notion of causation here makes little sense: just because two physical forces move an object does not mean that neither caused the movement. Price Waterhouse v. Hopkins, 109 S.Ct 1775 (1989)(Brennan, J., holding that the plaintiff had to show only that gender "played a motivating part" in a partnership selection process).

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case in the most egregious, complex, and subtle selection systems, such as those utilized in Watson v. Forth Worth Bank & Trust, 108 S. Ct. 2777 (1988).[5/] It is also unclear whether a subjective selection process without clearly identifiable component parts is a single employment practice or a series of practices.[6/]

This does not mean, as opponents of the legislation argue, that all a plaintiff need do to make a prima facie case is to show a disparity between the local population (or even the local labor force) and the employer's work force. First, the plaintiff must point to the relevant work force. This will vary depending upon the facts of the particular case and may include, for example, the geographically relevant workforce and/or the qualified workforce.[7/] Then the plaintiff must, under this proposed legislation, point to a practice or group of practices which is causing the discriminatory result. All these numbers must be statistically significant (see Appendix B below); they are not mere comparisons of different raw numbers. What the discrimination plaintiff should not have to do , because it may be completely impossible to do in many cases, is to have to assign a separate statistical value to the effect of each of the separate practices in a series of practices. As the brief of the Department of Justice in Wards Cove specifically noted:

> Of course, a decision rule for selection may be complex: it may, for example, involve consideration of multiple factors. And certainly if the factors combine

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[5/] Ironically, Watson was viewed by the public as a victory for civil rights plaintiffs because the Court applied disparate impact analysis to the use of subjective employment practices. In Wards Cove the Court effectively took back what it had apparently so recently given.

[6/] The absurd lengths to which plaintiffs may now have to go in order to establish a prima facie case was made evident in Green, 843 F.2d 1511, 1521 n. 10, remanded in light of Wards Cove, (the employer argued that not only did the plaintiffs have to identify the "specific procedure" -- in that case the requirement that applicants pass an interview -- causing the disparate impact but that the plaintiff had also to identify the "specific criteria" used in the interview process that caused the disparate impact).

[7/] Unless the particular qualification (e.g. a high school diploma) is at issue. Then the plaintiff may show the relevant proportions of the protected population or workforce likely to apply which has the qualification as compared to the general population or workforce.

> to produce a single ultimate selection decision and it is not possible to challenge each one, the decision may be challenged (and defended) as a whole. [8]

For example, in the case of denial of promotion to a partnership in a law firm, there may be a series of "requirements" such as personality, ability to attract clients, ability to work independently, etc. Taken together, these individual criteria may disproportionately disadvantage women or minorities. But, since none is given a numerical value by the decision makers, it will not be possible for the the plaintiff to show which, if any, individual practice is causing women and minorities to be screened out.

2. Individual Devices That Have Disparate Impact Only Cumulatively.

This issue closely relates to the requirement in Wards Cove that the plaintiff identify the specific practice that is alleged to be discriminatory. By instituting such a requirement, the Court has prevented employees from challenging employment systems that may have impact only cumulatively, thus insulating from review hiring and promotional decisions that are multi-faceted. In practical terms, the Court has thus insulated most subjective employment decisions, since those decisions are not made in isolation but are usually part of a process or dependant on several variables. This result directly conflicts with Congressional intent, as evidenced by the legislative history of the 1972 amendments to Title VII, which makes clear that Congress intended the disparate impact model of Griggs to apply to systems as well as isolated practices:

> Employment discrimination as viewed today is a ... complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs.

S.Rep. No. 92-415, at 5 (1971).

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[8] Brief for the United States, No. 87-1387, p.22.

The Eleventh Circuit relied on this legislative history in Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985), to hold that the disparate impact theory can be used both to challenge the end result of a multi-component selection process and to challenge subjective elements of those processes. Id. at 1523. The court specifically considered Connecticut v. Teal, 457 U.S. 440 (1982) and relied on the dissenters' (Powell, Burger, Rehnquist, and O'Connor) view in Teal that "our disparate-impact cases consistently have considered whether the result of an employer's total selection process had an adverse impact upon the protected group." 457 U.S. at 458.

3. Availability and Discoverability of Employment Records

In Ward's Cove, Justice White asserts for the majority that the plaintiff's burden of showing a causal link between employment practices and racial imbalances in the workforce will not be unduly burdensome on Title VII plaintiffs as "liberal civil discovery rules give plaintiffs broad access to employers' records in an effort to document their claims." 109 S.Ct. at 2125. The Court's assertion however, is unfounded because it fails to recognize 1) that there are many circumstances where an employer is under no obligation to collect or retain records or other information which will disclose the impact of the employer's selection procedures and 2) that many courts severely limit the amount of discovery available in Title VII cases.

For example, though EEOC regulations require all employers to make and preserve personnel or employment records (including but not necessarily limited to application forms and other records having to do with hiring, promotion, demotion, transfer, layoff or termination), these records must be preserved only for a period of six months. 29 C.F.R. §1602.14(a)(1988). Where a charge of discrimination has been filed or an action has been brought against the employer, the EEOC requires all personnel records "relevant to the

charge" to be kept until final disposition of the charge or action, but these regulations have been narrowly construed. For example, in EEOC v. M.D. Pneumatics, 31 EPD ¶33,459 (D.Mo. 1983), the court found that an employer did not violate recordkeeping requirements when he maintained records relevant to the individual claim of which he had notice but had destroyed employment applications that were over six months old before receiving notice that a class action had been filed. See also EEOC v. Dresser Industries, Inc., 668 F.2d 1199, 1204 (11th Cir. 1982) (court rejected EEOC charge that employer should have known of commission's ability to bring a class action suit and found that employer had satisfied regulations where he retained records of individual charge).

The EEOC Uniform Guidelines, 29 C.F.R. §1607.1 et seq. (1988), also require employers to maintain records and other information on the impact of employers' tests and selection procedures upon persons by race, sex, and ethnic group, but even these records do not provide plaintiffs with the necessary "tools" to meet this newly imposed burden of proof. As the majority itself acknowledges in a footnote in Ward's Cove, certain recordkeeping regulations do not apply to application records for temporary or seasonal employment. 109 S.Ct. at 2125 n.10; See also 29 C.F.R. § 1602.14(b)(1988). In a case such as Ward's Cove where the employment is seasonal in nature, an employer is exempted from the EEOC guidelines. Equally problematic is the fact that the EEOC guidelines do not consider recruiting practices to be selection procedures except to the extent that they determine qualifications or abilities to perform the job, thereby making it practically impossible for plaintiffs to prove why an employer had gone outside the immediate workforce, as was the case in Ward's Cove, 29 C.F.R. § 1607.2 (C)(1988).

Furthermore, § 1607.4(A) of the EEOC guidelines provides that where there are large numbers of applications and procedures are administered frequently, such information

may be retained on a "sample basis", thereby restricting plaintiffs to statistics that are vulnerable to employer bias and abuse and which may be neither scientific nor accurate. 29 C.F.R. § 1607.4(A)(1988).

In addition, under the EEOC guidelines an employer is not required to evaluate the individual components of the selection process for adverse impact unless the total selection process for a job has an adverse impact, except where (1) the selection procedure is a "significant" factor in continuing patterns of assignments of incumbent employees caused by prior discriminatory practices or (2) where the weight of court decisions or administrative interpretations hold that a specific procedure is not job related in the same or similar circumstances. 29 C.F.R. § 1607.4 (C)(1988). These limitations will make it impossible to demonstrate the impact of each specific practice in many instances and are also subject to misuse and abuse by employers who are careless or not especially forthcoming, particularly since these guidelines are entirely self-enforcing.

The guidelines also allow for simplified recordkeeping practices for employers with less than 100 employees. 29 C.F.R. § 1607.15(A)(1)(1988). As a substantial percentage of the workforce falls into this category, many plaintiffs will have no guarantee that their employer has kept records that are vital to proving their claims.

While the guidelines state that where an employer has not maintained data on adverse impact as required, an inference of adverse impact may be drawn, it remains to be seen how plaintiffs can meet their burden of proof where an employer has willfully destroyed documents or where an employer has not kept any records. See Judge Rules FMC Lied in Rights Suit, New York Times, June 21, 1989 (article concerning a pending case where a federal district judge found that corporate official had deliberately destroyed thousands of pages of evidence in response to a sex discrimination lawsuit).

Finally, local rules in many jurisdictions limit discovery available to plaintiff's in Title VII cases, particularly the number of interrogatories that may be served without leave of court. See, e.g., Fed. Local R. 8(c)(1)(Alaska)(written interrogatories limited to 20 questions including paragraphs and subparagraphs; upon completion of deposition and application to court, further interrogatories may be permitted); Fed. Local R. 8.2:1(C.D. Cal.)(no party shall without leave of court and good cause shown, serve more than 30 interrogatories including all subparts); Fed. Local R. 230-1 (S.D. Cal.)(no party shall without leave of court serve more than 25 interrogatories or requests for admission; any party desiring more shall submit a written memorandum setting forth proposed interrogatories or requests for admission and reasons establishing good cause); Fed. Local R. 9(d)(1)(Conn.)(no more than 25 interrogatories including all parts and subparts unless otherwise permitted; limit may not be waived by counsel); Fed. Local R. 4.1(B)(1)(Del.)(no party shall direct more than 50 written interrogatories and 25 requests for admission including subparts unless court otherwise orders). These limitations add to the difficulties that plaintiffs may encounter in the discovery process.

B. A Case Study Illustrating the Injustice Resulting from the New Requirement to Show Causation: *Equal Employment Opportunity Comm'n v. Joint Apprenticeship Comm. of the Joint Indus. Bd. of the Elec. Indus.*, No. 89-6165 (2d Cir. Jan. 31, 1990).

A recent Second Circuit case, remanded in light of Wards Cove, illustrates the extreme problems of proof under the new standard. Indeed, the case is probably wrongly decided even under the standards announced in Wards Cove, but it demonstrates most forcefully the effect of the anti-plaintiff message being sent by the current Court.

The defendant Joint Apprenticeship Committee of the Joint Industrial Board of the Electrical Industry ("JAC") administers training programs for apprenticeship electricians in the New York City metropolitan area. Slip op. at 2. Persons who successfully complete these programs are eligible for membership in the local electrician's union. Id.

The defendant required that, among other things, applicants possess a high school diploma or general equivalency diploma and be no more than 22 years of age (26 if they were veterans). The plaintiff, Equal Employment Opportunity Commission ("EEOC") sued, challenging that these diploma requirements discriminated against blacks and that the age limitation discriminated against women. Id. at 3.

EEOC showed that blacks constituted 18.3% of the relevant pool of potential applicants, but only 12.2% of the actual applicants to the JAC programs. The EEOC further showed that in counties from which JAC received applications, 89.2% of whites of pertinent age had high school diplomas compared to 68.3% of their black counterparts. Most important, a higher percentage of actual black applicants than whites lacked the required high school credentials. Moreover, higher percentages of white applicants were accepted than of blacks. Id. at 4-5.

As for proof of sex discrimination, EEOC showed, inter alia, that women constituted 31.5% of the potential pool. In addition, of those who actually applied, higher percentages of women were above the age limit than were men: 19.3% compared to 6.04% in the first program, 21.43% compared to 6.02% of the men in the second program, and 15.25% of women compared to 6.33% of men in the third program. Moreover, JAC accepted men at higher rates than women: in the first program 25% compared to 11%, 41% compared to 7% in the second, and 62% compared to 22% in the third. Id. at 5-6.

Based on its prima facie proof, EEOC moved for partial summary judgment on the issue of liability. JAC expressly limited its opposition to the motion on the basis of the EEOC's prima facie evidence. Id. at 6. It did not otherwise offer rebuttal evidence in defense of the business necessity of the age or diploma requirements.

The court of appeals vacated and remanded in light of Wards Cove. Id. at 12. The court held that the district court had not established that the requirements caused the disparate impact. Id.

The court's holding regarding race discrimination in this case is or should have been Griggs revisited. In Griggs, the Supreme Court noted that plaintiffs had established their prima facie case by showing that in North Carolina, the state in which the defendant operated, 34% of white males had high school degrees compared to 12% of black males. 401 U.S. at 430, 430 n.6. The Griggs Court did not require the plaintiffs to show that the diploma requirement was the sole cause for the lower number of blacks in the company's better paying positions or even a "but for" cause. By comparison, in Joint Apprenticeship, the EEOC's statistics showed that higher percentages of whites than blacks met the diploma requirements and that higher percentages of whites than blacks were accepted to the training program. The disparity in numbers should have been sufficient for the court to infer that the diploma requirement was a factor directly contributing to the disproportionately low selection of blacks.

The Second Circuit's discussion regarding Wards Cove's causation requirement is extreme, but illustrative of the problems created by the case. While Wards Cove required plaintiffs to identify the specific practice that caused the disparate impact, 109 S. Ct. at 2124, the EEOC had done so, by pointing out that the diploma requirement resulted in the rejection of disproportionate numbers of black applicants with and without high school

degrees. 'It remains unclear why the Second Circuit applied Wards Cove (which was directed to multicomponent selection systems), to this case (where only one practice was alleged to have created the racial disparity).

The Second Circuit's holding regarding age limitation is similarly inexplicable -- except as a lower court reading clear signals from the Supreme Court to halt the advance of women and minorities. The EEOC showed that disproportionate numbers of women applicants exceeded the age limitation and that disproportionate numbers of actual male applicants were accepted compared to actual female applicants. The age limitation disproportionately harms "reentry" women, i.e., women who decide to pursue careers later in their life. This case is a clear illustration of the hostile climate that Wards Cove has created towards disparate impact cases.

II. SHIFTING THE BURDEN OF PROOF

As a result of Griggs, employers who were unable to justify the necessity of their selection criteria have eliminated or revised them to better test job-related qualifications. For example, written examinations that tended to exclude minority applicants, but which were found not to test job related qualifications at all, have been revised. Diploma requirements, which did not measure good job performance have been eliminated. Height requirements that unnecessarily eliminated women and members of some ethnic groups from jobs as fire fighters and police officers have been eliminated.

The Wards Cove decision changed the rules of Griggs to provide that even after plaintiffs prove that an employer's practices disproportionately exclude persons based on race or other protected classifications, the employer does not have to justify the practice as

a business necessity. 109 S. Ct. at 2126. Rather, the employer need only articulate that its requirement serves, in a significant way, legitimate employment goals. Id. at 2125-26.[2/] The plaintiffs must then prove that the employer's business justification does not serve any legitimate employment purpose. Id. In response to the Court's decision to increase the burden on plaintiffs and decrease the burden on employers to justify such harm, Justice Blackmun, in his dissent to the Wards Cove decision, commented: "One wonders whether the majority still believes that discrimination is a problem in our society, or even remembers that it ever was." Id. at 2136.

The ACLU, however, has no doubt that discrimination still exists and that the effect of Wards Cove is to jeopardize the progress women and minorities have made in entering jobs traditionally closed to them. Wards Cove threatens to resegregate our workplaces at the expense of our industries' competitiveness and at the expense of equal employment opportunity for minorities and women.

[2/] It had been generally accepted in prior Supreme Court and lower court authority that the business necessity defense was in fact a defense, requiring that the employer not merely produce evidence in response to plaintiff's showing of harm, but that the employer prove that the harm was justified based on business necessity. See, e.g., Connecticut v. Teal, 457 U.S. 440, 446 (1982)(employer must demonstrate that requirement has a manifest relationship to the employment in question); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977)(employer has to prove that challenged requirements are job related). See also 109 S. Ct. at 2130 n.14 (1989)(Stevens, J., dissenting)(listing further examples of Supreme Court and lower court authority.

Moreover, the business justification standard set forth by Wards Cove reflects a marked relaxation of the former business necessity standard. Compare 109 S. Ct. at 2125-26 (whether the requirement serves in a significant way, legitimate employment goals) with Id. at 2132 (J. Stevens, Marshall, Brennan, Blackmun dissenting)(citing the Court's definition of business necessity in Dothard, 433 U.S. at 331, "essential to effective job performance"); 457 U.S. at 451 (requirement must measure "skills related to effective performance"); 433 U.S. at 331 ("essential to good job performance").

A. *Griggs v. Duke Power Company*: Defendants Could and Did Prevail

Contrary to the Supreme Court's unsupported assertion in Wards Cove that the Griggs business necessity standard required a degree of scrutiny that was almost impossible for employers to meet, therefore leading to quota systems imposed by employers, Wards Cove, 109 S. Ct. at 2126, employers could and frequently did successfully defend their employment practices as required by business necessity, even though they had a disparate impact on women and minorities. Cases in which defendants have prevailed include, for example, Gillespie v. State Dep't of Health & Social Services, 771 F.2d 1035 (7th Cir. 1985)(essay test for position of personnel specialist/manager was job-related despite disparate impact on minorities); Zahorik v. Cornell Univ., 729 F.2d 85, 96 (2d Cir. 1984)(selection criteria for tenured faculty, prior accomplishments and skills in scholarship and teaching upheld as job related despite any disparate impact on women); Boyd v. Ozark Air Lines, Inc., 568 F.2d 50, 54 (8th Cir. 1977)(upholding 5' 5" minimum height requirement for position in airline pilot training class despite disparate impact on women); Coopersmith v. Roudebush, 517 F.2d 818 (D.C. Cir. 1975)(test requiring applicants for attorney positions to write sample legal opinion upheld despite any disparate impact on women); United States v. Buffalo, 457 F. Supp. 612 (W.D. N.Y. 1978)(high school diploma requirement upheld for police patrol officer position despite adverse impact on blacks); Smith v. St. Louis San Francisco Ry. Co., 397 F. Supp. 580, 586 (D.C. Ala. 1975)(general clerical test justified by business necessity despite any discriminatory impact on blacks); James v. Stockham Valves & Fittings Co., 394 F. Supp. 434 (D.C. Ala. 1975)(aptitude tests used by valve manufacturers found sufficiently related to successful job performance despite any disparate impact on black applicant).

B. *Wards Cove v Atonio*: The Effects on Employers, Employees, and the Goals of Federal Anti-Discrimination Law.

Wards Cove not only tears down a carefully created structure to eliminate barriers to employment opportunity for those traditionally excluded from the work place, minorities and women, but it also reverses by judicial fiat what Title VII, the federal anti-discrimination in employment law, sought to restrict: unfettered managerial fiat at the expense of equal employment opportunity.

The Griggs court imposed these requirements on the employer for several reasons in particular the fact that employers have greater financial resources to explore non-discriminatory alternatives to discrimination as a means of achieving their legitimate goals. The adoption of Title VII spawned several criticisms -- that the law would make business more expensive, that, after all, some customers would prefer not to be served by "coloreds", or that male employees would resent working for their "lady" bosses.[10/] Nevertheless, Congress recognized that cultural biases, even supposedly profit-maximizing ones, do not take precedence over the rights of qualified minorities and women to the same employment opportunities as their white male counterparts. Congress also recognized that employers have greater resources and knowledge to assess its legitimate business requirements than do persons challenging these requirements. The Wards Cove requirement that applicants or employees have the burden of providing that an employment practice does not serve any legitimate employment goal contradicts this common understanding.

The Wards Cove burden-shifing requirement also ignores the reality of our adversarial system. Even liberal discovery rules providing plaintiffs with access to

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[10/] See Comment, The Business Necessity Defense to Disparate-Impact Liability Under Title VII, 46 U. Chi. L. Rev. 911, 912-13 (1979); id. at 913 n.8 (citing Fiss, A Theory of Fair Employment Laws, 38 U. Chi. L. Rev. 235, 298-99 (1971); Note, Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach, 84 Yale L. J. 98, 102 (1974).

employment records are no substitute for employer evaluations as to what job requirements best serve the employer's needs. Cf. 109 S. Ct. at 2125. Facts are gleaned during depositions from company officials who may not be wholly forthcoming.[11/] Moreover, plaintiffs lack the resources, financial and informational, to conduct validation studies of employment requirements.

Employers who have been shown to have adopted policies that tend to exclude women and minorities should be required to justify the need for that harm. Instead, the Wards Cove majority equates such employer conduct with that at issue in a disparate treatment case: under the new rules, in either a disparate impact or disparate treatment case, the employer merely needs to show a business justification for its conduct. 109 S. Ct. at 2126. This analysis ignores the distinctions between these theories. Under a disparate treatment challenge, an employer's legitimate reason for its action negates any assertion that the employer has singled the plaintiff out for different treatment based on race or other protected classifications. Under a disparate impact challenge, even after proof exists that the employer's practices in fact favor white male candidates, the employer's asserted legitimate reason supposedly negates the plaintiff's proof of harm. Wards Cove sends employers the wrong signal. Some employers may think that as a result of Wards Cove they do not need to evaluate their selection criteria or applicant pools to determine if they are excluding qualified minorities or women as candidates. Yet, without such careful evaluations, employers will find themselves having to make selections from an increasingly narrow pool, and therefore employing increasingly less competitive and productive work forces. The disparate impact theory has provided a helpful incentive to employers to adopt

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11/ Note, Watson v. Forth Worth Bank & Trust Co.: A Plurality's Proposal to Alter the Evidentiary Burdens in Title VII Disparate Impact Cases, 67 N.C.L. Rev. 725, 738 n.16 (1989).

precise criteria designed to measure accurately required job qualifications. In a decade in which minorities, women and immigrants will reflect five out of every six new entrants into the marketplace,[12/] employers need to utilize these persons' abundant talents, not to exclude them based on criteria that select white males only on the basis of the race and sex, rather than on criteria related to job performance.

C. Case Studies Illustrating the Injustice Resulting from Shifting the Burden of Proof: Post Wards Cove Decisions.

Earlier studies have already begun to recount how the Supreme Court's rulings last term have undermined the scope and effectiveness of federal anti-discrimination law.[13/] The Wards Cove decision has had a similar effect on disparate impact claims: as many disparate impact claims have been dismissed or undermined as a result of Wards Cove as have claims of intentional discrimination been dismissed as a result of Patterson.[14/] This section of the report discusses these claims and the cases in which they were brought. Each case illustrates how Wards Cove changed the rules so that employer discretion now reigns at the expense of equal employment opportunity. Practices that harm women and minorities' equal employment opportunities are now being upheld regardless of the employer's need for these practices.

12/ U.S. Dep't of Labor, Workforce 2000: Work and Workers for the 21st Century at xx (1987).

13/ See, e.g. "The Impact of Patterson v. McLean Credit Union," A Report by the NAACP Legal Defense and Educational Fund, Inc., Nov. 20, 1989 (indicating that at least 96 discrimination claims had been dismissed because of Patterson).

14/ See, e.g. Bernard v. Gulf Oil Corp., 890 F.2d 735 (5th Cir. 1989)(class action disparate impact case dismissed despite selection tests disparate impact on blacks and tests' lack of correlation to job performance)); telephone interview with Judith Reed, NAACP Legal Defense and Educational Fund, Inc. (Feb. 16, 1990) (68 claims); Evans v. City of Evanston, 881 F.2d 382 (7th Cir. 1989)(relief vacated for 39 claims); Allen v. Seidman, 881 F.2d 375 (7th Cir. 1989)(relief vacated for 16 claims). These cases illustrate that the decision is every bit as costly in human terms as Patterson.

Evans v. City of Evanston, 881 F.2d 382 (7th Cir. 1989).

Charlene Evans wanted to be a fire fighter for the City of Evanston. The city, population 74,000, employs 106 fire fighters, none of whom are women. Ms. Evans took the fire department's physical agility test in 1983 and failed. That year, more than 90% of male applicants passed while fewer than 16% of women applicants passed.

The Evanston fire department, in response to the class action lawsuit filed by Ms. Evans and on behalf of thirty-nine women who took the 1983 exam, conceded the exam disproportionately harmed women. The city claimed, however, that the exam was required by business necessity.

Evans charged that the exam's cut off point had no relation to a proven requirement for fire fighting. The facts showed that the cut off point was one standard deviation above the mean. The record reflected that the city used different cut off points for different years. In 1985, the cut off point was three standard deviations above the mean. When the physical agility test was administered to incumbent fire fighters under the age of 35, seven of the thirty two incumbents failed to make the 1983 cut off, and two had times slower than Ms. Evans'. Testimony revealed that one standard deviation is a frequent cut off point for tests.

The district court, in a decision prior to Wards Cove, 695 F. Supp. 922 (N.D. Ill. 1988), held that the cut off point was generally unrelated to work performance. Therefore the court barred the test. As part of its remedy, the court ordered that it would review any new cut off point for job-relatedness or review any new test adopted by the fire department. The city appealed.

In response to Wards Cove, the Seventh Circuit vacated the district judge's order. The Seventh Circuit noted that under Wards Cove's modified rules, the employer no longer

had to prove the job relatedness of the cut off point; rather, the defendant may simply show that the cut off point merely serves a legitimate employer purpose. Moreover, the Seventh Circuit held that the employer's assertions of custom were sufficient to meet its burden of production and shift the burden to Ms. Evans to prove that the test did not serve the legitimate ends of the employer.

Evans v. City of Evanston illustrates that the Wards Cove decision hinders the ability of persons to challenge arbitrary barriers to equal employment opportunity. As a result of Wards Cove, the physical agility test, which Evans has proven and the city concedes disproportionately excludes women, is still valid. Both parties agreed that the test harms women's equal employment opportunities and two courts have found the test as applied to be unrelated to job performance. Prior to Wards Cove, that unnecessary barrier would have already fallen. After Wards Cove, and more than a year after the district court invalidated the test, plaintiffs still have not won their case.

Allen v. Seidman, 881 F.2d 375 (7th Cir. 1989).

In 1981, Agee Allen sued his employer, challenging that the employer's promotional test disproportionately excluded blacks and was not required by business necessity. Agee Allen was a black bank examiner employed by the Federal Deposit Insurance Corporation ("FDIC"). He sought a promotion from his current GS-9 position to the GS-11 position of commissioned bank examiner. He and others took a Program Evaluation test his employer used at that time to determine promotions. The test, which the employer abandoned shortly after the suit was filed, had no set questions, no set right or wrong answers, no fixed passing grade and no instructions for weighing performance on various parts of the exam. Eighty-four percent of whites who took the exam passed compared to 39% of blacks.

In a decision entered prior to Wards Cove, the district court held that the test had a disparate impact on blacks and that the employer failed to prove business necessity. The court found in favor of the class of sixteen black employees, including Mr. Allen, and ordered that the test be barred. Allen v. Seidman, No. 81-C-911 (N.D. Ill. Feb. 25, 1988). The FDIC appealed.

Following Wards Cove, the Court of Appeals vacated the district court's order and remanded. 881 F.2d at 375. The Seventh Circuit agreed that the exam had a disparate impact on blacks. Id. at 378. Nevertheless, under the Supreme Court's modified rules, the Court held that the employer no longer had to prove business necessity, but merely had to produce evidence that the test served a legitimate employment purpose. Id. at 379. The case was later settled, but for less relief than had been ordered by district court. Allen v. Seidman, No. 81-C-911 (N.D. Ill. Jan. 5, 1990). In particular, the settlement required little prospective relief. Unlike the settlement, the earlier order had required the defendant to demonstrate the validity of promotional procedures in use in its 9 regions and to submit a final validity study by a qualified industrial expert. It had required that the defendant name experts acceptable to the class counsel. The defendant was to have paid for the validity study and the court was to retain jurisdiction over the issue of further injunctive relief if the new test was not validated. Moreover the court required the defendant to furnish information to plaintiffs' counsel to facilitate additional monitoring of progress. No. 81-C-911 (N.D. Ill. Feb. 25, 1988), Again, as in Evans, as a result of Wards Cove, tests that have been proven to favor white or male candidates are no longer scrutinized by courts to ensure that employers prove such favoritism is merely a coincidental by-product of a valid job requirement.

Bernard v. Gulf Oil Corp., 890 F.2d 735 (5th Cir. 1989).

Gulf Oil Corporation has an oil refinery in Port Arthur, Texas. Id. at 737. Skilled positions in the refinery were primarily in its operations and maintenance ("crafts") department and unskilled positions in its labor department. Labor department employees assist the craft groups. Until 1954, the crafts department was exclusively white; until 1956, the labor department was exclusively black. Id.

In 1967, Gulf management restructured its work force. Id. The company reclassified workers in the maintenance department. Two job categories were eliminated: mechanical helper and craft helper. Mechanical helpers were reclassified as utility men, a demotion. Craft helpers were reclassified as craft trainees, a promotion, provided they passed a simple test. Two hundred and three of 204 craft helpers who took the test passed. 95.6% of those promoted were white. A large portion of the mechanical helpers who were demoted were black. Id. at 738.

The Fifth Circuit upheld this reclassification despite its disparate impact on blacks. Id. at 735. The court found that the reclassification denied senior blacks the opportunity to by-pass junior whites. Id. at 739. The court, relying on Wards Cove, however, stated that the reclassification if it merely served significantly the employer's legitimate goals. Id. at 740. In support of its holding that the reclassification served legitimate employment goals, the court cited the testimony of the employer's expert that the reclassification was efficient. In particular, the expert stated that the previous method of work assignments contributed to excess maintenance costs. The witness also testified that the new measures conformed with industry practices. The district court also found that the reclassification reduced training costs. Id. at 741.

In the same decision, the Fifth Circuit, post-Wards Cove, also upheld craft tests that had been shown to have a disparate impact on blacks, requiring that the employer merely produce evidence that the tests met its employment goals. Two tests had been challenged: pre-1971 "Old Tests" and post-1971 "New Tests." Id. at 738. Each had been proven to have a disparate impact on blacks. Id. Under the old tests, 82.5% of whites passed compared to 42.8% of blacks. Id. at 738 n.3. Under the New Tests, 97.7% of whites passed compared to 66% of blacks. Id.

In upholding both these tests, the court of appeals relied on evidence showing that the tests measure job-relatedness for only two of the five craft positions for which these tests were applied. Id. at 743. Three other validation studies were inconclusive regarding the correlation between test scores and performance. Id. at 742. The court of appeals also relied on the district court's fact finding: the district judge looked at the skills required for the validated craft positions (boilermaking and pipefitting) compared them to the positions not validated (welding, carpentry and the instrument positions) and decided that the tests were job-related to those positions as well. Id. at 743.[15/]

Bernard illustrates the harmful effect of Wards Cove. Even where disparate impact is shown, the employer does not have to justify the business necessity of the requirement. Moreover, Bernard illustrates how little the employer must show; even where the job-

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15/ In upholding the crafts tests, the court may have misinterpreted Supreme Court authority on the point. The Fifth Circuit claims that Supreme Court authority does not require employers to introduce validation studies showing that particular criteria predict actual on-the-job performance. In support, the court of appeals cites the plurality in Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777, 2790 (1988). 890 F.2d at 742. The court cites Justice Blackmun's dissent in part in that case as a fifth vote adding to the 4 vote Watson plurality. Id. The court quotes Blackmun out of context. Justice Blackmun was discussing subjective criteria, or discretionary employment decision,s when he recognized that job relatedness can not always be established by a mathematical certainty. 109 S. Ct. at 2796. He was not discussing objective criteria, such as a crafts test. Moreover, the Wards Cove Court does not appear to accept the Watson plurality's statement either, as it failed to include such a discussion in Wards Cove, even though the case involved objective criteria as well as subjective criteria. Id. at 2620.

related validity of a test cannot be shown, a judge may find in favor of the employer on extremely loose evidence of job relatedness.

Police Officers for Equal Rights v. City of Columbus, No. C2-78-394 (S.D. Ohio Feb. 5, 1990).

In Columbus, Ohio, black police sergeants who wanted to become lieutenants passed the required examination at a rate 54% of that of their white counterparts. Id. at 8.[16/] While the district court, per Judge Graham, found that the difference in pass rates showed adverse impact, the court held that plaintiffs could not meet their burden under Wards Cove. Id. at 61.

Five years earlier, and before Wards Cove, the district court found that Columbus had discriminated against blacks in its examination for police sergeant. See Police Officers for Equal Rights v. City of Columbus, 644 F. Supp. 393 (S.D. Ohio 1985). At that time, the court did not consider the potential adverse impact of the lieutenant examination, due to the dearth of black officers in the upper ranks. No. C2-78-394, slip op. at 2. A court order, written by Judge Graham, concluded that, "the best remedy for black under-representation in the ranks above sergeant will come through the eventual promotion of many of the additional black sergeants." Id.[17/] To protect against future discrimination, as part of the remedy, the order decreed, that "[i]f promotional examinations have an adverse impact on blacks, defendants must show that they are job related." Id. at 7 (emphasis added).

In his February, 1990 opinion, however, reviewing the disparate impact of the lieutenant's examination, Judge Graham held that Wards Cove had changed the defendant's

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[16/] Thirteen black sergeants challenged the examination's disparate impact. Telephone interview with Alexander Spater, attorney for the plaintiffs (Feb. 16, 1990).

[17/] Today, 15% of the city's 1,200 police officers are black. Spater interview, supra note 17.

burden of proof. After Wards Cove, the burden of proof remains with the plaintiff at all times. The defendant merely has a burden of production.

The City of Columbus came forward with justifications for the examination. While the Court criticized aspects of the examination, such as the manner in which a portion of the examination was pilot-tested, the setting of a time limit for that portion, and defendant's failure to document the rationale for the selection of certain tested material, see id. at 61-62, the court nevertheless held that plaintiffs could not meet today's heightened burden and therefore upheld the use of the exam in determining promotions for lieutenants.

Police Officers for Equal Rights illustrates several points. First, it illustrates the degree of uncertainty permissible in validating tests under the relaxed Wards Cove standard. The case also illustrates Wards Cove's exacerbation of the "glass ceiling" phenomenon: the Courts are in effect, saying that blacks whose employment opportunities could be assured only through court orders, have now risen far enough. Under the modified rules, the courts will no longer adopt their previously vigilant role. Third, the case illustrates the reach of Wards Cove; the court applied its relaxed standards even to an earlier court ordered remedy for past discrimination.

In some respects this case is unique. The city, having been found to have previously discriminated, produced a great deal of evidence. Moreover, it had been operating under the Griggs assumption that the employer had the burden of persuasion. The court does not say whether the city's evidence would have satisfied Griggs. In the future, whether employers with less-known track records for discrimination will launch as vigorous a defense as did Columbus, Ohio, or whether a court applying Wards Cove's standards will require such a showing seems unlikely.

These cases illustrate Wards Cove in practice: disparate impact showings are subjected to heightened scrutiny; requirements that exclude blacks and women and are found not required for business necessity nevertheless do not fall. Relaxed standards of proof may even apply to remedial schemes for past discrimination. As a result, the Griggs rule, that employment requirements measure the person for the job and not the person in the abstract, has been nullified. Hardworking, capable, and eager minorities and women have begun to see the barriers to equal employment opportunity once more being erected.

D. Hypothetical: What if the *Wards Cove* Standard Rather Than the *Griggs* Standard Had Applied to *Griggs* and its Progeny?

If the Wards Cove standard had been applied to Griggs and its progeny, how would those cases have differed in their result? If the requirements such as written examinations, height requirements, educational requirements, and weight requirements, to name a few, had been upheld, even though the employer could not demonstrate that they were necessary to job performance, how would the composition of our work force differ today?

The answer unfortunately is clear. The requirements, constructed with the notion that the average worker is a white male, would continue to isolate out white male characteristics, regardless of job relatedness. Our police and fire departments would be taller, heavier, less black, less female, less Hispanic, less Asian. Our skilled positions would be occupied by white high school or college graduates or by whites who scored higher on the standardized tests.

Griggs' high school diploma requirement would have been the first employment barrier to have been upheld under the Wards Cove standard. The court of appeals in Griggs, while noting that the diploma requirement rendered ineligible a markedly disproportionate number of blacks,[18/] nevertheless upheld the diploma requirement. Griggs v. Duke Power Co., 420 F.2d 1225 (1970). The court of appeals applied a Wards Cove type standard for determining the validity of the requirement: whether Duke Power Company had a valid business purpose in adopting the education requirement. Id. at 1232. Finding that the requirement generally would improve the overall quality of the work force, the court upheld the requirement. Id. at 1232-33.

Wards Cove would negate the fairness and logic of the Supreme Court's holding in Griggs that the diploma requirement could stand only if proven to be job related by the employer. 402 U.S. at 436. The Griggs Court's reasoning provides a resounding rebuttal to the Wards Cove/Griggs Court of Appeals rationale: "History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the common sense proposition that they are not to become masters of reality." Id. at 433. As a result of Wards Cove, the Duke Power Company's high school diploma requirement has been elevated to "master of reality."

The Wards Cove standard, if applied in the Supreme Court's decision in Albermarle Paper Co. v. Moody, 422 U.S. 405 (1976), might have changed that case's result, as well. Albermarle involved a challenge by black paper mill employees to the company's

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18/ 34% of white males in the relevant labor pool had completed high school while only 12% of black males had done so. 401 U.S. 424, 430 n.6.

requirement that the applicants for certain skilled positions[19/] have a high school diploma and pass certain standardized employment tests. The tests and diploma requirement were shown to screen out blacks. Id. The district court invalidated the high school diploma requirement. The court of appeals held that the employer failed to validate its test requirements. Id. at 412. The Supreme Court set forth careful guidance as to how an employer should validate tests and remanded the case.

Under the Wards Cove decision and its progeny, see e.g., Bernard v. Gulf Oil Co., a court today might uphold an employer's incomplete validation.[20/] Wards Cove no longer requires that the employer prove anything. Evidence of validation, even if not based on a professionally acceptable study, may well be adequate to shift the burden to the persons harmed by the test to prove the negative: that the tests do not significantly serve any legitimate employment (though not necessarily job related) goal.

The arbitrary height and weight requirements which had prevented women and certain minorities from entering protective services positions (such as prison guards, police officers, and fire fighters) might never have fallen under a Wards Cove standard. The Supreme Court, in Dothard v. Rawlinson, 433 U.S. 321 (1977), applied the Griggs rule to reject height and weight requirements for the position of prison guard . Dianne Rawlinson, a college graduate who had majored in correctional psychology, was refused employment as a correctional counselor (prison guard) because she failed to meet the minimum 120-pound weight requirement. Id. at 323.

19/ These skilled positions had been expressly reserved for white employees up until 1964. 422 U.S. at 409.

20/ Compare 422 U.S. at 428 (noting that the company "simply" adopted the national "norm" score as a cut-off point) with Evans, 881 F.2d at 385 (under relaxed standard of Wards Cove, the physical agility test cut-off point based merely on customary practice was insufficient to prevent satisfaction of employer's burden).

The district court, in reliance on Griggs, struck down the requirements. Id. at 328. Rawlinson had shown that the 5'2" requirement would exclude 33.29% of women in the United States while excluding only 1.28% of men. Id. at 329. The 120 pound weight restriction would exclude 22.29% of women and 2.35% of men. Id. Combined, the restrictions would exclude 41.13% of women while less than 1% of men. Id. at 329-30. The Supreme Court agreed that, given the disparate impact shown, the employer had failed to prove that the height and weight requirements were essential to effective job performance. Id. at 331.

Given that the employer in Dothard failed to produce any evidence justifying the requirements, id., one can only speculate as to arguments in support of the requirements that might be upheld under a relaxed Wards Cove standard. A few come to mind. The opinion suggests that the employer asserted without evidence, that the height/weight requirements were in some way related to strength. Id. Even under Wards Cove standard such a bald assertion should not suffice. However, since the employer need not show job-relatedness, the employer might even argue a looser standard, such as was upheld in Bernard, see supra, that taller, heavier guards are "customary" in the industry. If a court applying the Wards Cove standard, then shifted the burden of proof to Ms. Rawlinson, she would then have to prove that the height and weight requirements, rather than not being necessary, did not significantly serve any legitimate employment goal, job-related or not. Cf. Dothard, 433 U.S. at 340 (Rehnquist, J., concurring in the result and concurring in part) (Title VII would allow a minimum height and weight requirement on the basis of the appearance of strength, regardless of actual strength).

Subjective or discretionary employment practices may be well insulated from challenges based on disparate impact after Wards Cove. Justice O'Connor, writing for a

unanimous court, in Watson v. Forth Worth Bank and Trust, 108 S. Ct. 2777 (1988), held that subjective criteria could be challenged under a disparate impact theory. Id. at 2787. She noted, however, that these criteria given they are less susceptible to standardization, will be easier to defend than objective criteria. Id. at 2791 (plurality). Under a Wards Cove standard, they may be inviolable.

For example, in Watson, Clara Watson sued her employer, Fort Worth Bank and Trust, alleging that her employer's subjective selection devices for promotions had a disparate impact on blacks. The bank promoted employees to supervisory positions based on the subjective judgment of white supervisors. Id. at 2782. Ms. Watson had sought four promotions over the course of several years; her white supervisors each time denied her applications. Id.

The Supreme Court held that Watson could challenge her employer's promotional practices based on disparate impact theory. Id. at 2787. Assuming she had shown disparate impact, however, under the Wards Cove standard her employer would merely have to claim that its subjective selection practice significantly served a legitimate employment goal. Perhaps the employer would have asserted, as the employer in Bernard did and the 5th Circuit accepted as sufficient to meets its burden, that its employment practice was "efficient." See 890 F.2d at 741. Then, Ms. Watson would have to show that the employer's reliance on its supervisors' opinions was not only not efficient but that it also did not significantly serve any legitimate employment goal.

In conclusion, a review of some of the Supreme Court's decisions prior to Wards Cove illustrates that the Wards Cove standards change not only the rules but also the results. Test requirements, diploma requirements, height and weight requirements,

subjective criteria, all these are barriers to employment opportunities, that will become less and less susceptible to challenge, regardless of their business necessity. After Wards Cove, minorities and women have fewer means of ensuring that the doors to equal employment opportunity remain open to them.

Appendix A: Defining Disparate Impact

Disparate impact" has been defined in a number of different ways. The terms 'adverse effect,' 'disparate impact' and 'adverse impact' are used as synonyms in Title VII cases. See B. Schlei and P. Grossman, Employment Discrimination Law 73 n.42 (1976) Below is a compilation of how cases (Part 1), treatises (Part 2), law review articles (Part 3), and EEOC Guidelines (Part 4) have defined disparate impact. This analysis demonstrates that making a statistical showing of disparate impact is neither an easy or automatic thing for plaintiffs to do in Title VII cases.

1. Cases

The Supreme Court

International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977):

"[c]laims of disparate treatment may be distinguished from claims that stress 'disparate impact.' The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact **fall more harshly on one group than another** and cannot be justified by business necessity."

Dothard v. Rawlinson, 433 U.S. 321, 328-29 (1977):

"[T]o establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a **significantly discriminatory pattern**".

First Circuit

Fudge v. City of Providence Fire Department, 766 F.2d 650, 658 (1st Cir. 1985):

"When statistical tests sufficiently diminish chance as a likely explanation, it can then be presumed that an apparently **substantial difference** in pass rates is attributable to discriminatory bias, thus shifting the burden to defendants to show job relatedness."

Second Circuit

Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1015 (2d Cir. 1980) cert. denied 452 U.S. 940 (1981):

"A prima facie case of discriminatory impact may be established by showing that an employer's neutral practice has a disparate impact on the plaintiff's racial group...such a discriminatory racial impact is frequently evidence by statistics demonstrating that the employer's selection methods or employment criteria result in employment of a **disproportionately larger share** of whites than blacks out of a pool of qualified candidates"

Third Circuit

EEOC v. Greyhound Lines, 635 F.2d 188 (3rd Cir. 1980):

"To prevail...EEOC had to demonstrate that members of [plaintiff's] race suffered **substantially disproportionate** effects from the application of a seemingly neutral policy."

Fourth Circuit

EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633, 639 (4th Cir. 1983) (dicta) (rev'd on other grounds,) 467 U.S. 867 (1984):

"...an employment practice or procedure of defendant, which, though neutral or fair on its face, has a **discriminatory impact**..."

Wright v. Olin, 697 F.2d 1172, 1186 (4th Cir. 1982):

"[Disparate impact claims involve] employment practices that are facially neutral in their treatment of different groups but that in fact **fall more harshly on one group than another** and cannot be justified by business necessity" (citing Teamsters).

Fifth Circuit

Pouncy v. Prudential Insurance, 668 F.2d 795, 800 (5th Cir. 1982):

"In order to establish a claim of racial discrimination under this [disparate impact] theory, a plaintiff need only show that a facially neutral employment practice produces a **significantly adverse impact** on one race...When coupled with an identifiable employment practice, neutral in form but discriminatory in operation, **statistics that show a significant disparity** in an employer's work force raise an inference that employment decisions are tainted by intrusion of illegitimate concerns."

Walls v. Mississippi State Dept. of Public Welfare, 730 F.2d 306, 315 (5th Cir. 1984):

"To prove a disparate impact in a Title VII class action, the plaintiff class must set forth discrete, facially neutral employment practices that **operate more harshly on one group than another.**"

Sixth Circuit

Lynch v. Freeman, 817 F.2d 380, 383 (6th Cir. 1987):

"Disparate impact cases typically are concerned with facially neutral practices or standards that in fact work to place a **disproportionate burden on a discrete group** of employees who are protected under Title VII."

Seventh Circuit

Yuhas v. Libbey-Owens Ford Co., 562 F.2d 496, 598 (7th Cir. 1977) cert. denied 435 U.S. 934 (1978):

"...[T]o establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a **significantly discriminatory pattern.**"

Eighth Circuit

Green v. Missouri Pacific Railroad Co., 523 F.2d 1290, 1293 (8th Cir. 1975):

"Although the employment practice in question is facially neutral, an employment test or practice which operates to exclude a **disproportionate percentage** of blacks violates Title VII unless the employer can establish that the practice is justified by business necessity."

Donnell v. General Motors Corp., 576 F.2d 1293, 1296 (8th Cir. 1978):

"In order to establish a prima facie cases of discrimination under Title VII in a case alleging disparate impact, the plaintiff must show only that the facially neutral standard in question **selects applicants in a significantly discriminatory pattern.**"

Ninth Circuit

Gregory v. Litton Systems, 316 F. Supp. 401, 403 (C.D. Cal. 1970) aff'd as mod. 472 F.2d 631 (9th Cir. 1972):

"Discrimination exists even though such a policy is objectively and fairly applied as between applicants of various races. A **substantial and disproportionately large** number...are excluded from employment opportunities by defendant's policy."

Peters v. Lieuallen, 746 F.2d 1390, 1392 (9th Cir. 1984):

"In order to make out a prima facie case of disparate impact, the plaintiff must show that a facially neutral selection system has a **significantly discriminatory impact** on a group protected by Title VII."

Tenth Circuit

Mortensen v. Callaway, 672 F.2d 822, 824 (10th Cir. 1982):

"To [prove a prima facie case of disparate impact], she needed to show that the Army utilized employment practices that, while facially neutral in their treatment of different groups, had a **discriminatory effect or impact** on a particular groups."

Coe v. Yellow Freight System, Inc., 640 F.2d 444, 451 (10th Cir. 1981):

"Proof of disparate impact gives rise to a prima facie case of discrimination upon a showing that the practices operated to exclude members of a protected group. **Statistical evidence will often be sufficient to establish disparate impact.**"

Eleventh Circuit

Kilgo v. Bowman Transp., Inc., 789 F.2d 859, 867-68 (11th Cir. 1986):

"In order to establish a prima facie case of discrimination, a plaintiff must show by a preponderance of the evidence that a facially neutral employment practice has a **substantial adverse impact** upon a protected group."

EEOC v. Sambo's of Georgia, 27 E.P.D. ¶ 32,342, at p. 23,369 (N.D. Ga. 1981):

"Disparate impact] doctrine...holds that a Title VII violation may be established by showing that an employment practice or policy has a **disproportionately adverse effect** on members of the protected class as compared with non-members of the protected class."

D.C. Circuit

Reynolds v. Sheet Metal Workers Local 102, 498 F. Supp. 952, 969 (D.D.C 1980) aff'd 702 F.2d 221 (1981):

"Racially neutral selection criteria having a **disparate impact** on minority applicants give rise to a prima facie case of employment discrimination in violation of Title VII."

2. Treatises

B. Schlei & P. Grossman, Employment Discrimination Law 1287 (1983):

"The essence of an adverse impact theory is a showing that a policy or practice has a **substantial adverse impact** on a protected group, notwithstanding its equal application on all individuals."

A. Larson, 4 Employment Discrimination 12A.00 (1981):

"Discrimination may be found when an ostensibly neutral factor...works **disproportionate damage** on the employment opportunities of one sex, and when the factor does not have a bona fide business justification.

3. Law Reviews

Employment Discrimination and Title VII of the Civil Rights Act of 1964. 84 Harv. L. Rev. 1109, 1118 (1971):

...[I]t shall be up to the plaintiff to show that the standard in question does have a **differential impact** on some class of people protected by the Act... Moreover, the **differential impact shall be substantial."**

Seidenfeld, Sex-Based Wage Discrimination Under the Title VII Disparate Impact Doctrine, 34 Stanford L. Rev. 1083, 1103 (May 1982):

"Title VII disparate impact doctrine prohibits employment practices which **disproportionately disadvantage** women unless those practices are sufficiently job-related to meet the 'business necessity' defense."

G. Harper, Statistics as Evidence of Age Discrimination, 32 Hastings L.J. 1347, 1351 (May 1981):

"In a disparate impact cases [establishing a prima facie case of employment discrimination] consists of establishing that the plaintiff as a member of a protected class of individuals, describing the facially neutral employment practice, and demonstrating, usually by means of **statistics, the extent of the adverse impact** on the plaintiff class."

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J. Rigler, 59 Notre Dame L. Rev. 313, 322 (1984):

"In order to establish that a requirement has a disparate impact, the plaintiff must produce **statistically significant evidence of such an effect...**"

4. EEOC Uniform Guidelines on Employee Selection Procedures

29 C.F.R. 1607.16(b) Definitions: Adverse Impact:

"**A substantially different rate of selection** in hiring, promotion, or other employment decision which works to the disadvantage of members of a race, sex, or ethnic group."

29 CFR 1607.4(d) Adverse Impact and the "four-fifths rule"

"A selection rate for any race, sex or ethnic group which is less than four-fifths (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact. **Smaller differences in the selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where the user's actions have discouraged applicants disproportionately** on groups of race, sex, or ethnic group. Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female applicants to be atypical of the normal pool of applicants from that group."

Conclusion

As the above compilation reveals, there is no standard definition of disparate impact. While most cases follow the spirit of the definitions that the Court set forth in International Teamsters and Dothard, the precise language varies from case to case. It is clear, however, that whatever the precise definition adopted by a particular court, it does not mean a mere showing of some statistical difference.

Appendix B: Defining Statistically Significant

1. Generally

In disparate impact cases, a court must determine the degree to which chance can be ruled out as a possible cause of the disparity, in order for a statistical comparison to be "significant" so that an inference of discrimination may be drawn. Thus, the level of significance is a statistical method of identifying the probability that the observed cause-effect relationship occurred by chance. Agid, Fair Employment Litigation: Proving & Defending a Title VII Case 543 (2d Ed. 1979). Some have questioned whether "statistically significant" should be equated with "legally significant."[1]/ Still, courts have tried to determine how "statistically significant" a disparity must be before it can infer that the disparity results from discrimination rather than random chance. D. Baldus & J. Cole, Statistical Proof of Discrimination, §9.92 at 320 (1980).

The courts have never endorsed a unitary statistical definition of disparate impact or effect. The case law has recognized at least three possible tests for statistical significance where parties have introduced finely tuned statistics: 1) "two or three standard deviations" test; 2) the .05 level of statistical significance; and 3) the 4/5ths rule of the Uniform Selection Guidelines.

Given the various tests which often produce different results, the meaning of "statistically significant" differs from case to case. As one commentator noted, "[t]he

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[1]See United States v. Test, 550 F.2d 577, 584 (10th Cir. 1977)("The mathematical conclusion that the disparity between these two figures is 'statistically significant' does not, however, require a priori finding that these deviations are 'legally significant'..."; Smith & Abram, Quantitative Analysis and Proof of Employment Discrimination, 1 Univ. of Ill. Rev. 33, 48 (1981)("A careful analysis of the leading Supreme Court decisions on statistical evidence shows that the Court has not held that statistical comparisons of employment data alone establish guilt as a matter of law.")

adoption of a particular level or test of statistical significance...is arbitrary and depends upon the relative confidence one wished to have in rejecting or accepting the null hypothesis." Smith & Abram, Quantitative Analysis and Proof of Employment Discrimination, 23 Univ. Ill L. Rev. 33, 43 (1977-78). The three above mentioned tests are discussed below.

2. Two-Three Standard Deviations[2]/

The two-three standard deviation test was first applied to employment discrimination statistical proof by the Supreme Court in Hazelwood School District v. United States, 433 U.S. 299, 309-11 7 nn. 14 & 17 (1977). The Court followed the standard deviation analysis as a means of testing statistic proof that the Court had first recognized in Castaneda v. Partida, 430 U.S. 482, 496-97 n.17 (1977). In Hazelwood, the Court noted a disparity in the "percentage of Negroes on Hazelwood's teaching staff" of less than 2 percent and a "percentage of qualified Negro teachers in the area" of "at least 5.7 5" and then commented:

> A precise method of measuring the significance of such statistical disparities was explained in Castaneda v. Partida. It involves calculation of the 'standard deviation' as a measure of predicted fluctuations from the expected value

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[2] "A standard deviation analysis tests the hypothesis that underrepresentation of a protected group in any sample made up of a protected and nonprotected group (binomial distribution) might be attributable to normal fluctuations of chance rather than to discriminatory design. The standard deviation is the measure of the predictable fluctuation in a random selection process. The difference between the actual number of the protected group in such a sample and the number that would be expected in a perfectly proportional process of selection from the appropriate pool can then be expressed in numbers of standard deviations. In turn, standard deviations can be expressed in terms of mathematical probability that chance is the cause of the disparities (difference between observed numbers and expected values) measured. The standard deviation test in based on two factors: thee extent of departure from what would be expected to be the norm and the sample size. The larger the sample size the lower the deviation must be to equal a standard deviation. As the standard deviation increases numerically, the probability of chance as the cause of revealed underrepresentation diminishes. To the extent that probability of chance is shown to be quite small, the legal inference of discrimination based upon a rough legal assessment that disparities are manifestly 'gross' or 'substantial' is thus 'scientifically' confirmed." B. Schlei and P. Grossman, Employment Discrimination Law 1372 n.331 (1983).

> of a sample...[T]he expected number of Negroes on the Hazelwood teaching staff would be roughly 63 in 1972-73 and 70 in 1973-74. The observed number in those years was 16 and 22, respectively. The difference between the observed and expected values was more than six standard deviations in 1972-73 and more than five standard deviations in 1973-74. The Court in Castaneda noted that '[a]s a general rule for such large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations', then the hypothesis that teachers were hired without regard to race would be suspect...

433 U.S. at 308-09 n.14. Many courts have followed the Hazelwood rule. See Guardians Association v. Civil Service Commission, 484 F. Supp. 785, 793 (1980) aff'd in pertinent part 630 F.2d 79 (1980). Cert denied 452 U.S. 940 (1981) (39 standard deviations statistically significant); Hameed v. Intern. Ass'n of Bridge, 637 F.2d 506, 513 (8th Cir. 1980)(5.5 standard deviations statistically significant); EEOC v. Lady Baltimore Foods, Inc., 643 F. Supp. 403, 409 (D. Kan. 1986)(2.23 standard deviations is too low "if the spirit of Hazelwood is to be honored"); EEOC v. United Virginia Bank, 615 F.2d 147 (4th Cir. 1980); Palmer v. Schwartz, 815 F.2d 84, 96 n.9 (D.C. Cir. 1987)(two or three standard deviation standard established in Hazelwood constrained court from accepting test of significance at .05 significance level where test would accept disparities of 1.645 standard deviations as statistically significant); Kilgo v. Bowman Transp., Inc., 789 F.2d 859, 872-73 n.18 (11th Cir. 1986)(disparities ranging from 1.92 standard deviations to 5.3 standard deviations statistically significant -- Castaneda and Hazelwood do not require a disparity of more than three standard deviations as the huge difference between two and three standard deviations suggests that the Court did not intend to fix a specific test of significance).

The two-three standard deviations test has been criticized at length by D. Baldus and J. Cole in Statistical Proof of Discrimination Sec. 9.03 (Supp. 1987). See also Schlei & Grossman, Employment and Discrimination Law, 1373 citing W. Hays and R. Winkler, Statistics, Probability, Inference and Decision, 218-19, 381-82 (1971), which notes that statisticians accept 1.96 standard deviations as statistically significant.

3. 05 Level of Statistical Significance[3]/

The .05 level of statistical significance means that the probability of statistical disparity occurring by chance is five percent. While two standard deviations is roughly comparable to the .05 level of statistical evidence, the .05 level of statistical confidence actually equates with the 1.96 standard deviations. Schlei and Grossman, Employment Discrimination Law 1373, citing W. Hays and R. Winkler, Statistics: Probability, Inference and Decision, 218-19, 381-82 (1971).

This test has been utilized by some courts. See Ensley Branch of N.A.A.C.P. v. Seibels, 616 F.2d 812, 817 (5th Cir. 1980); Contreras v. City of Los Angeles, 656 F.2d 1267, 1272 n.3 (9th Cir. 1981) cert. denied 455 U.S. 1021 (1982); Reynolds v. Sheet Metal Workers Local 102, 498 F. Supp. 952, 969 (D.D.C 1980);

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[3] "The concept [of statistical significance] is tied to the statistical theory of probability and is dependent upon the number of people in the sample. Generally if a correlation coefficient is so low, that, on the basis of the sample size involved, more than one in twenty random drawings could be expected to produce a correlation at least as great, that correlation coefficient is considered not to be statistically significant, or simply to be the same as a correlation coefficient of .0. On the other hand, if the obtained coefficient could be expected to reoccur no more than once in 20 random drawings, it is considered statistically significant, the statistical indication for which is $p < .05$. A correlation coefficient of the obtained magnitude which could not be expected to occur by chance more than once in 100 random drawings is expressed as p.01. Mueller [Schuessler & Castner, Statistical Reasoning in Sociology, 2d Ed.] at 394, et seq." (Ensley Branch of N.A.A.C.P. v. Seibels, 616 F.2d 812. 817 n.13 (5th Cir. 1980).

In addition, several commentators have argued that .05 is the most appropriate test of statistical significance. See Hallock, The Numbers Game-The Use and Misuse of Statistics in Civil Rights Litigation, 23 Vill. L. Rev. 5, 13 (1977-78)("Although some statisticians have argued that the .05 level of significance is completely arbitrary, and that the use of a higher -- .01 -- or lower -- .10 level could be more meaningful in some contexts, the use of the .05 level of significance in employment discrimination cases seems appropriate..."); Harper, Statistics As Evidence of Age Discrimination, 32 Hast. L.J. 1347, 1354 (1981)("The choice of a particular level of significance is subjective. Scientists, to compare the quality of each other's data, have set some standard levels. One standard level is a five percent level of significance. Some commentators suggest that the five percent level of significance was chosen because the early abbreviated statistical tables included that level. A more generous view is that the five percent level was chosen because, being two standard deviations from the average, it is relatively easy to calculate. Most modern statisticians are critical of using five percent or any level as an absolute standard of significance. Nevertheless, many courts have followed the scientist's path and used the five percent level as a determination of valid statistical evidence...")

4. The Four-Fifths Rule[4]/

Under the 4/5ths rule as applied in the Guidelines, the rates of hire or promotion of minorities are compared to the rates of non-minorities. If the minority rate is less than 80% of the non-minority rates, adverse impact is deemed established. Courts have occasionally utilized the "four fifths" rule. See Wilmore v. City of Wilmington, 533 F. Supp. 844, 854 n.25 (D. Del. 1982), rev'd on other grounds, 699 F.2d 667 (3rd Cir. 1983)(Uniform Guidelines entitled to "great deference" but courts "not bound" by them); Walls v. Mississippi State Dep't of Pub. Welfare, 542 F. Supp. 281, 312 aff'd in relevant part, 730 F.2d 306 (5th Cir. 1984); Firefighters Institute v. City of St. Louis, 616 F.2d 350, 356-57 (5th Cir. 1980) cert. denied 452 U.S. 938 (1981); Bigby v. City of Chicago, 38 FEP 844 (N.D. Ill. 1984), aff'd 766 F.2d 1053 (7th Cir. 1985) cert. denied 474 U.S. 1056 (1986.) But see Fudge v. City of Providence Fire Dep't., 766 F.2d 650, 659 n.10 (1st Cir. 1985)(four-fifths rule not accurate test of discriminatory impact when sample is small.) In addition, the 4/5ths rule has been bitterly criticized by scholars. See Shoben, Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII, 91 Harv. L.Rev. 793 (1978).

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[4]16 C.F.R. 1607.4(D). See infra at p. 12 for text of the 4/5ths rule.

Conclusion

The courts have not adopted a unitary rule of what constitutes statistical significance. Baldus and Cole have suggested that a test of statistical significance, be it the two-three standard deviation rule or the .05 significance level, should be treated as an aid to interpretation rather than as a rule of law. As they have noted in Statistical Proof of Discrimination Sec. 9.4 at p. 188-89 (Supp. 1987):

> This [rule of law] approach was never intended by the United States Supreme Court in Castaneda and Hazelwood and completely misses the point that in discrimination suits, as in all other contexts, tests of statistical significance and confidence intervals do not lay down arbitrary rules for accepting or rejecting data. Rather, the tests provide information to assist one in assessing the degree of reliability of the data and in answering specific questions of interest.

While many courts have not followed this approach, it is worth keeping in mind before adopting a rigid definition of what constitutes "statistical significance."

PREPARED STATEMENT OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
JULIUS LEVONNE CHANBERS, DIRECTOR-COUNSEL

Chairman Kennedy, and distinguished members of the Committee. My name is Julius Chambers and I am the Director-Counsel of the NAACP Legal Defense and Educational Fund. The purpose of this statement is to support S.R. 2104, the Civil Rights Act of 1990, which seeks to restore our nation's fair employment laws in the wake of a series of recent Supreme Court rulings that cut back dramatically on the scope and effectiveness of those laws.

My testimony addresses two matters: first, the impact of one of those rulings, Patterson v. McLean Credit Union,[1] and second, the need for extending the statute of limitations for cases brought under Title VII.

I.

THE IMPACT OF PATTERSON V. MCLEAN CREDIT UNION

When the United States Supreme Court decided Patterson v. McLean Credit Union last summer, it severely reduced the

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[1] 105 L. Ed. 2d 132, 109 S. Ct. 2363 (1989).

protections which federal law had afforded against intentional discrimination on the basis of race. The statute at issue in Patterson, 42 U.S.C. § 1981, is a century-old Civil Rights law. For years it has been construed by the lower federal courts to forbid all forms of intentional racial discrimination in contractual relations, including all forms of racial discrimination in employment. Since Patterson was decided, the statute no longer protects most victims of intentional racial discrimination who previously would have had section 1981 claims.

The NAACP Legal Defense Fund, Inc. issued a report in November, 1989 describing the impact that the Patterson decision had already had in just five months. A copy of that report, together with an update as of February 23, 1990, is attached to this statement and I would like to make it part of the record. The trends we identified in November have continued. I want to emphasize today just a few of the devastating effects of the Patterson decision.

The Number of Dismissals

Between June 15, 1989 and November 1, 1989,[2] at least 96 claims of intentional racial discrimination have been dismissed by federal judges without ever being tried[3] and resolved on the

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[2] Excluding Saturdays, Sundays, Holidays, the federal courts were open a total of 97 days during this period.

[3] A few of the cases discussed below were dismissed under Patterson after having been tried on the merits. E.g. Morgan v. Kansas City Area Transportation Authority, 1989 U.S. Dist. LEXIS 10482 (W.D. Mo. 1989) (overturning $60,000 jury verdict for victim of discrimination discharge).

merits, solely because of the Patterson decision. Since November, at least an additional 62 claims have been dismissed, resulting in a total of at least 158 dismissed claims. The actual number of claims dismissed because of Patterson since June 15, 1989, is higher, for a number of reasons,[4] but the precise figure cannot readily be ascertained. Although Patterson itself involved racial harassment, the largest group of claims dismissed under Patterson are not harassment claims at all, but claims that a plaintiff's contract was terminated of his or her race; some 31 of the dismissals are of this sort. A total of 22 racial harassment claims have been dismissed in the wake of Patterson, as have 16 claims alleging that promotions or transfers were denied on account of race. Patterson has led, as well, to the dismissal of 8 retaliation claims, and 6 demotion claims.

The Characteristics of the Dismissed Claims

Section 1981 applies not just to blacks, but to all racial and ethnic groups. Thus, the decision in Patterson, narrowing the types of discrimination forbidden by section 1981, leaves a wide range of persons exposed to discriminatory conduct for which there is no longer a section 1981 remedy. Among the section 1981 claims dismissed under Patterson have been allegations of racial

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[4] There are a number of decisions which dismiss multiple claims, but do not specify how many there were or what their nature might have been. E.g. Woods v. Miles Pharmaceuticals, 1989 U.S. Dist LEXIS 7642 (N.D. Ill. 1989). There appear to be a significant number of instances in which section 1981 claims have been dismissed without written opinions in one line orders, or have been dismissed by judges from the bench.

discrimination against Hispanic,[5] native Hawaiian,[6] Chinese,[7] Filipino,[8] Cuban,[9] and Jewish[10] plaintiffs.

The claims eliminated by Patterson are not statistically-based claims of discriminatory impact, nor are they class-actions or affirmative-action cases. The plaintiffs in the dismissed cases have all alleged intentional discrimination directed against them individually on the basis of race.

Examples of Dismissed Claims

Decisions handed down since Patterson provide examples of the shocking discrimination courts will no longer remedy under section 1981. Several of these cases are discussed in our report, and I understand that some of those plaintiffs whose cases were thrown out have agreed to testify before this committee.

Terrell McGinnis, a mechanic for Ingram Equipment Company, was the only black employee at the company and was subjected to

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[5] Gonzalez v. The Home Insurance Co., 1989 U.S. Dist. LEXIS 8733 (S.D.N.Y. 1989).

[6] Leong v. Hilton Hotels, 50 FEP Cas. 738 (D. Hawaii, 1989).

[7] Risinger v. Ohio Bureau of Workers' Compensation, 883 F.2d 475 (6th Cir. 1989).

[8] Brackshaw v. Miles, Inc. 1989 U.S. Dist. LEXIS 12820 (N.D. Ill. 1989).

[9] Alvarez v. Norden Systems, Inc., 1989 U.S. Dist. LEXIS 9954 (S.D.N.Y. 1989).

[10] Sofferin v. American Airlines, Inc., 1989 U.S. Dist. LEXIS 9632 (N.D. Ill. 1989).

repeated indignities, slurs, humiliation and physical abuse because of his race. During a lunch, for example, the company's owner and manager, H.D. Ingram, Jr., put McGinnis' sandwich on the restaurant floor and said, "Here you go, my nigger." The company refused to promote and then demoted Mr. McGinnis because he is black. After Patterson, he has no section 1981 claim. McGinnis v. Ingram Equipment Company, 888 F.2d 109 (11th Cir. 1989).

Helen Brooms is a Black woman who worked as an industrial nurse, and was forced to leave her job after her supervisor, Charles Gustafson made repeated racial and sexual remarks, and showed her illustrations of interracial sexual acts, telling her that she was hired to perform such acts. After Patterson, Ms. Brooms no longer has a section 1981 claim. Brooms v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989).

Bunny Kishaba, a Hawaiian woman of Asian ancestry, worked as a secretary for Hilton Hotels Corporation's Senior Vice President, Earl McDonough, whose repeated racist remarks were not disputed in her lawsuit. McDonough stated that "locals tend to be slow, lazy and laid back," are "not capable of being supervisors" are "incompetent," and were like "the spics in New York." He complained "I have the only secretary who does the hula," and warned that "if you people," -- referring to local Hawaiians and Asians -- "if you people don't shape up, I'll get rid of all of you." After Patterson, whether the result of such conduct is "constructive discharge or simply an extraordinarily

depressed employee," Ms. Kishaba no longer has a section 1981 claim. Leong v. Hilton Hotels, 50 FEP Cas. 738 (D. Hawaii 1989).

Gary Mason is a Black man who worked for the Coca Cola Bottling Company, which conceded that plaintiff's co-workers had told "numerous racial jokes and used frequently racial epithets." One employee was alleged to have commented after Mr. Mason's child was still-born that he had "never seen a depressed nigger before." After Patterson, Mr. Mason no longer has a section 1981 claim. Mason v. Coca-Cola Bottling Co., 1989 U.S. Dist. LEXIS 10533 (D.Kan. 1989).

Title VII Remedies Are Often Unavailable

Although the majority in Patterson narrowly construed section 1981 in order to avoid overlapping Title VII, in a significant number of the post-Patterson cases, Title VII remedies are unavailable. In Gonzalez v. The Home Insurance Co., 1989 U.S. Dist. LEXIS 8733 (S.D.N.Y. 1989), for example, the complaint alleged that the defendant insurance companies had rejected insurance clients represented by the plaintiff insurance agency because the owners of the agency were Hispanic, and that the insurance companies had placed discriminatory requirements on plaintiffs but not white agents. In Nolan's Auto Body Shop, Inc. v. Allstate Insurance Co., 718 F.Supp. 721 (N.D. Ill. 1989), the plaintiffs claimed that Allstate had cancelled an agreement for insurance repair work to be done at a garage because its owners were black. In Clark v. State Farm Insurance Co., 1989 U.S. Dist. LEXIS 10666 (E.D. Pa. 1989), the plaintiff asserted that

State Farm had refused to pay her legitimate insurance claim because she was black. The only federal statute which arguably forbade the alleged discrimination in these cases was section 1981, but in each case the claim was nonetheless dismissed under Patterson. In other cases, Title VII remedies are unavailable, even to plaintiffs who seek to invoke them, because of procedual obstacles or inadvertent errors.

Chaos in the Lower Courts After Pattersoon

The majority opinion raises far more questions than it resolves. Prior to Patterson, the federal courts had held that virtually all forms of racial discrimination in employment violated section 1981. The decision in Patterson leaves clear only two things about the scope of section 1981: a racially motivated refusal to hire violates an employee's rights under section 1981, and a practice of racial harassment, adopted after an employee was hired, does not. The majority opinion apparently contemplates that some but not all promotion claims will remain within the scope of section 1981, but which claims are still covered remains entirely unclear. The decision's relevance to claims of discriminatory contract termination remains unresolved, and yet is critical to the continued usefulness of section 1981.

In the ordinary course of litigation, such issues could easily require a decade or more to resolve. In the meantime, the inevitable disagreements and uncertainty about Patterson's scope are already apparent:

With respect to discriminatory contract termination, for example, Padilla v. United Air Lines, 716 F. Supp. 485 (D. Colo. July 5, 1989), held that termination is still covered because it affects the existence of the contract, not merely its terms, while in the same jurisdiction Rivera v. A.T. & T. Information Systems, 719 F. Supp. 962 (D. Colo. 1989), concluded that termination is not covered because it occurs after the commencement of the employment relationship.[11]

With respect to promotion claims, Patterson held that "[o]nly where the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer is such a claim actionable under section 1981." 105 L.Ed.2d at 156. As of today there appear to be several different interpretations of this entirely novel concept, with courts looking to any factors they think might be relevant. And in evaluating promotion calims, courts have tended to weigh differently the factors they choose: For example, Anderson v. United Parcel Service, 1989 U.S. Dist. LEXIS 12195 (N.D. Ill. 1989), rejected a section 1981 promotion case because the promotion involved a significant change in duties, but only a minor increase in salary, while Williams v. National Railroad Passenger Corp., 716 F. Supp. 49 (D.D.C. 1989), rejected a

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[11] Also compare English v. General Development Corporation, 717 F. Supp. 628 (N.D. Ill. August 15, 1989) (Duff, J.) (holding that discharge in retaliation for protesting race discrimination is still covered), with Hall v. County of Cook, Illinois, 719 F. Supp. 721 (N.D. Ill. August 14, 1989) (Rovner, J.) (holding one day earlier that such retailatory discharge no longer covered).

section 1981 promotion claim because the promotion involved a significant increase in salary, but only a minor change in responsibilities. Brenda Patterson's own promotion claim has been thrown out by the district court, in the absence of any motion or briefing, on the ground that the new position was compensated at a higher rate but on the same wage basis, at the same location, in the same office, and "under the same working conditions" as her prior job.

There has been a divergence, as well, in the more general approach the lower courts have taken to the problems and issues raised by Patterson. Several lower court decisions have recognized the need to allow section 1981 plaintiffs to amend their complaints to include additional allegations that may now be required by Patterson.[12] Other courts, however, have in the wake of Patterson dismissed section 1981 claims with an alacrity bordering on enthusiasm. Many opinions articulate no standards and provide no reasoning, but merely conclude -- often sua sponte in the absence of any request by defendants -- that Patterson requires dismissal. Some opinions read as if on-the-job discrimination and racial harassment not only is no longer actionable under section 1981, but is now protected activity with which the federal courts are not to interfere.

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[12] E.g. Hannah v. The Philadelphia Coca-Cola Bottling Co., 1989 U.S. Dist. LEXIS 7200 (E.D.Pa. 1989); Prather v. Dayton Power & Light Co., 1989 U.S. Dist. LEXIS 10756 (S.D. Ohio 1989); English v. General Development Corp., 717 F. Supp. 628 (N.D. Ill. 1989).

The Broader Impact of Patterson

Our discussions with attorneys across the country indicate that, in addition to those cases that are thrown out of court becuse of Patterson, many claims will now not be pursued because private practitioners cannot predict even a fair chance of success. Lawyers who were already handling section 1981 cases when Patterson was filed are encouraging their clients to abandon those claims. Judge Richard Posner, a Reagan-appointee of a fairly conservative persuasion, has expressed concern as to "[h]ow many plaintiffs can successfully negotiate the treacherous and shifting shoals of present-day federal employment discrimination law." Malhotra v. Cotter & Co., 50 FEP Cas. 1474 (7th Cir. 1989). In the long term this deterrent effect of Patterson is likely to be more important, and far reaching, than lower court opinions interpreting that decision.

Conclusion

The Patterson opinion has had very serious and regrettable consequences for the men and women who have to live with the intractable realities of racial discrimination. Our entire legal system is correctly premised on a recognition that individuals and officials shape their conduct in light of the likely legal consequences of those actions. When the Supreme Court reduces the likelihood that employers who discriminate can be called to account for their practices, or restricts the remedies that even a successful civil rights plaintiff can win, the Court shifts the

balance of considerations that affect how employers will act.

The majority in Patterson insisted it had not retreated so much as one inch from the national policy to forbid intentional racial discrimination. At the same time, however, it has in practical terms rendered section 1981 almost useless as a weapon against invidious discrimination. This is not time for tampering with the arsenal of remedial measures that have made possible the civil rights progress of the last two decades. The hard won right of black Americans -- of all Americans -- to equal opportunity should not be subject to reconsideration, even in the highest court in the land.

II.
THE NEED FOR AN EXTENDED LIMITATIONS PERIOD

The Legal Defense Fund strongly supports the extension of the limitations period for filing a charge with the Equal Employment Opportunity Commission from 180 days to two years, and eliminating the second 300 day limitation period if a charge has been filed with a state fair employment agency. This simplification would eliminate a source of great confusion to persons seeking redress for discrimination and would prevent the loss of the fundamental right to proceed in federal court because of failure to follow a number of highly technical rules.[13] Under the proposed bill a complainant need only file with the EEOC within two years of either the occurence of the act complained of, or from the date the act complained actually adversely

[13] See Mohasco Corporation v. Silver, 447 U.S. 807 (1980).

affected the complainant. The EEOC would send a copy of the charge to a state referral agency, but the complainant would not have to have filed a charge with the state agency under a different time frame as a condition to proceeding under Title VII.

The provision of a two-year period would also bring Title VII in line with other federal statutes and not place victims of discrimination under uniquely stringent time requirements.[14] Finally, the Act would increase the current thirty day period in which a federal employee must file a civil action after having received notice of a final decision to the same ninety days enjoyed by all other employees. This removes the anomaly of one class of employees having a far shorter time in which to preserve their right to a hearing in federal court.

In brief, these changes, although seemingly technical in nature, would eliminate the injustice of substantial claims of employment discrimination being summarily dismissed without a determination of their merits because of time frames that are difficult for lawyers, let alone lay persons, to understand.

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[14] See, e.g., 15 U.S.C. 15b, which provides a four year period in which to file a private civil anti-trust action.

Cases Dismissed Under
Patterson v. McClean Credit Union

As of November 1, 1989

Key:

H Harassment
D Discharge/Termination
DM Demotion
P Promotion/Transfer
R Retaliation
N7 Discriminatory practice not covered by Title VII
M Miscellaneous discriminatory treatment

Summary
Number of Claims Dismissed, by Type

Harassment	22	Discharge	31
Demotion	6	Promotion/Transfer	16
Retaliation	8	No Title VII coverage	7
Misc. employment	6	TOTAL	96

D DM R Alexander v. New York Medical College, 50 FEP Cas. 1729 (S.D.N.Y. 1989).

D Alvarez v. Norden Systems, Inc., 1989 U.S. Dist. LEXIS 9954 (S.D.N.Y. August 24, 1989).

P (5) Anderson v. United Parcel Service, 1989 U.S. Dist. LEXIS 12195 (N.D.Ill. October 5, 1989). (5 plaintiffs).

H D Becton v. Burlington Northern Railroad Co., 878 F.2d 1436 (6th Cir. 1989).

H P D Brackshaw v. Miles, Inc., 1989 U.S. Dist. LEXIS 12820 (N.D.Ill. 1989).

H Brooms v. Regal Tube Company, 881 F.2d 412 (7th Cir. 1989).

D P Brown v. Avon Products, 1989 U.S. Dist. LEXIS 12142 (N.D.Ill. 1989).

H Bunyan v. Fleming Food Co., No. 88-9652 (E.D.Pa.)(order from the bench, September 27, 1989).

H(2) D Busch v. Pizza Hut, Inc., 1989 U.S. Dist. LEXIS 11974 (N.D.Ill. 1989).

D Bush v. Union Bank, 1989 U.S. Dist. LEXIS 10936 (W.D.Mo. 1989). (2 plaintiffs)

P — Byrd v. Pyle, No. 87-3547 (CRR)(D.D.C.)(Slip opinion, September 1, 1989).

D — Carroll v. General Motors, 1989 U.S. Dist. LEXIS 10481 (D.Kans. 1989).

D — Carter v. Asselton, 50 FEP Cas. 251 (M.D.Fla. 1989).

N7 — Clark v. State Farm Insurance, 1989 U.S. Dist. LEXIS 10666 (E.D.Pa. 1989).

D — Conley v. University of Chicago Hospitals, 50 FEP Cas. 1145 (N.D.Ill. 1989).

D — Copperidge v. Terminal Freight Handling, 50 FEP Cas. 812 (W.D. Tenn. 1989).

H D P — Crader v. Concordia College, 1989 U.S. Dist. LEXIS 12114 (N.D.Ill. 1989).

H D DM R (3) — Dangerfield v. Mission Press, 50 FEP Cas. 1171 (N.D.Ill. 1989). (3 plaintiffs)

P (3) — Dicker v. Allstate Life Insurance Co., 1989 U.S. Dist. LEXIS 12482 (N.D.Ill. 1989).(3 plaintiffs)

N7 (2) — Gonzalez v. Home Insurance Co., 50 FEP Cas. 1173 (S.D.N.Y. 1989).

D P M — Greggs v. Hillman Distributing, 719 F.Supp. 552; 50 FEP Cas. 429 (S.D.Tex. 1989).

H M N7 — Guerra v. Tishman East Realty, 1989 U.S. Dist. LEXIS 6744 (S.D.N.Y. 1989).

D — Hall v. County of Cook, Illinois, 719 F.Supp. 721 (N.D.Ill. 1989).

H — Harris v. Home Savings Association, 1989 U.S. Dist. LEXIS 7015 (W.D.Mo. 1989).

D M — International City Management Assoc. Retirement Corp. v. Watkins, 1989 U.S. Dist. LEXIS 12201 (D.D.C. 1989).

D — Jackson v. Commonwealth Edison, 1989 U.S. Dist. LEXIS 10514 (N.D.Ill. 1989).

D — Jones v. Alltech Associates, 1989 U.S. Dist. LEXIS 10422 (N.D.Ill. 1989).

DM — Jordan v. U.S. West Direct Co., 50 FEP Cas. 633 (D.Colo. 1989).

H(2) D DM Leong v. Hilton Hotels, 50 FEP Cas. 738 (D.D.C. 1989).

H Mason v. Coca-Cola Bottling Co., No. 88-2636, U.S. Dist. LEXIS 10533 (D.Kans. 1989).

H M Mathis v. Boeing Military Airplane Co., 719 F.Supp. 991; 50 FEP Cas. 689 (D.Kans. 1989).

H D Matthews v. Freedman, Darryl and McCormick, Taylor & Co., 882 F.2d 83, 50 FEP Cas. P874 (3rd Cir. 1989).

R Matthews v. Northern Telecom, Inc., 1989 U.S. Dist. LEXIS 12926 (S.D.N.Y. 1989).

H Miller v. Aldridge, 1989 U.S. Dist. LEXIS 9747 (1989).

D Morgan v. Kansas City Area Transportation Authority, 1989 U.S. Dist. LEXIS 10482 (W.D.Mo. 1989).

P Newman v. University of the District of Columbia, 1989 U.S. Dist. LEXIS 12201 (D.D.C. 1989).

N7 Nolan's Auto Body Shop v. Allstate Insurance, 718 F.Supp. 721 (N.D.Ill. 1989).

H Obago v. Union of American Hebrew Congregations, 1989 U.S. Dist. LEXIS 9058 (S.D.N.Y. 1989)

R Overby v. Chevron USA, Inc., 884 F.2d 470, 50 FEP Cas. 1211 (9th Cir. 1989).

D Prather v. Dayton Power & Light, 1989 U.S. Dist. LEXIS 10734 (S.D.Ohio 1989).

N7 Ragin v. Steiner, Clateman & Assoc., 714 F.Supp. 709 (S.D.N.Y. 1989).

H Riley v. Illinois Dept. of Mental Health, 1989 U.S. Dist. LEXIS 7686 (N.D.Ill. 1989).

H Risinger v. Ohio Bureau of Workers' Compensation, 883 F.2d 475 (6th Cir. 1989).

D Rivera v. AT&T Information Systems, 719 F.Supp. 962 (D. Colo. 1989).

P D Sofferin v. American Airlines, Inc., 717 F.Supp. 597 (N.D.Ill. 1989).

N7 Torres v. City of Chicago, 1989 U.S. Dist. LEXIS 9503 (N.D.Ill. 1989).

H D Washington v. Lake County, 717 F.Supp. 1310; 50 FEP Cas. 1247 (N.D.Ill. 1989).

D (2) Williams v. Edsal Manufacturing Co., 1989 U.S. Dist. LEXIS 12606 (N.D.Ill. 1989).(2 plaintiffs)

P M R Williams v. National Railroad Passenger Corp., 716 F.Supp. 79 (D.D.C. 1989).

M R Woods v. Miles Pharmaceuticals, 1989 U.S. Dist. LEXIS 7642 (N.D.Ill. 1989).

Additional Cases Dismissed Under
Patterson v. McLean Credit Union

As of February 23, 1990

KEY

H	Harassment
D	Discharge
DM	Demotion
P	Promotion/Transfer
R	Retaliation
N7	Discriminatory practice not covered by Title VII
M	Miscellaneous discriminatory treatment
F	Contract formation
*	Cases decided prior to but not included in original report

Summary
Number of Claims Dismissed, by Type

Harassment	22
Discharge	37
Demotion	2
Promotion/Transfer	10
Retaliation	4
Miscellaneous discriminatory treatment	24
Contract formation	6
TOTAL	105

TYPE	CLAIMS DISMISSED
M	Alexander v. Jefferson Parish, 1990 U.S. Dist. LEXIS 1326 (E.D. La. Feb. 6, 1990).
D, M	Boykin v. Golden Rule Ins. Co., 1990 U.S. Dist. LEXIS 536 (N.D. Ill. Jan. 16, 1990).
P	Brown v. American Food Service Corp., 1990 U.S. Dist. LEXIS 1214 (E.D. Pa. Feb. 6, 1990).
D	Carroll v. General Accident Ins. Co. of America, 1990 U.S. Dist. LEXIS 423 (5th Cir. Jan. 16, 1990).
D *	Carter v. Aselton, 50 F.E.P. Cases 251 (M.D. Fla. 1989).

D, F	Carter v. O'Hare Hotel Investors, 1989 U.S. Dist. LEXIS 13156 (N.D. Ill. Nov. 1, 1989).
D	Coleman v. Domino's Pizza, Inc., 1990 U.S. Dist. LEXIS 259 (S.D. Ala. Jan. 9, 1990).
D	Cook v. Marriott Corp., 51 F.E.P.Cases 922 (D.N.J. 1989).
H, M	Council v. City of Topeka Fire Department, 1990 U.S. Dist. LEXIS 1315 (D. Kan. Jan. 11, 1990).
H, M	Cruz v. Standard Motor Products, Inc., 1989 U.S. Dist. LEXIS 15197 (D. Kan. Nov. 16, 1989).
D	Davis v. Piggly Wiggly Southern, Inc., No. CV687-52, slip op. (S.D. Ga. Dec. 19, 1989).
D	Dumas v. Phillips College of New Orleans, Inc., 1989 U.S. Dist. LEXIS 14188 (E.D. La. Nov. 21, 1989).
H, D, DM	Duse v. International Machines Corp., No. B-84-455, slip op. (D. Conn. Feb. 5, 1990).
D, P	Easley v. General Motors, No. IP89-154-C, slip op. (S.D. Ind. Nov. 2, 1989).
D *	Eklof v. Bramalea, Ltd., 1989 U.S.Dist. LEXIS 12836 (E.D. Pa. Oct. 27, 1989)
H	Foster v. Atchison, topeka & Santa Fe Railway, 1990 U.S. Dist. LEXIS 1338 (D. Kan. Jan. 9, 1990).
H	Fuller v. Buhrke Industries, 1990 U.S. Dist. LEXIS 1535 (N.D. Ill. Feb. 12, 1990).
H, M *	Gamboa v. Washington, 50 F.E.P. Cases 524 (E.D. Ill. 1989).
D, F, N7	Gersman v. Group Health Association, Inc., 725 F.Supp.573 (D.D.C. 1989).
H, D	Gonzalez v. National Railroad Passenger Corp. 1989 U.S. Dist. LEXIS 11108 (E.D. Pa. Sept. 18, 1989).

D, M	Goodson v. Cigna Insurance Company, 1990 U.S. Dist. LEXIS 680 (E.D. Pa. Jan. 23, 1990).
H, P, M(5)	Griddine v. Dillard Department Stores, U.S. 51 F.E.P. Cases 306 (W.D. Mo., 1989).
D	Guerrero v. Preston Trucking Co., Inc., 1989 U.S. Dist. LEXIS 15175 (N.D.Ill. Dec. 20, 1989).
D	Gunn v. General Foods Corporation, 1990 U.S. Dist. LEXIS 1449 (N.D.Ill. Feb. 9, 1990).
H, D, R *	Hannah v. Coca-Cola Bottling Co., 1989 U.S. Dist. LEXIS 7200 (E.D. Pa. June 26, 1989).
D	James v. Dropsie College, a/k/à/ Annenberg Research Institute, 1989 U.S. Dist. LEXIS 14103 (E.D.Pa. Nov. 22, 1989).
D	Johnson v. United States Elevator Corp., 51 FEP Cases 305 (E.D. Mo.1989).
D, F	Jones v. ANR Freight System, Inc., 1990 U.S. Dist. LEXIS 501 (N.D. Ill. Jan. 17, 1990).
D	Joseph v. Zachary Manor Nursing Home, 1990 U.S. Dist. LEXIS 755 (M.D. La. Jan. 22, 1990).
H, P, R, M(3)	Lewis v. B.P. Oil, Inc., 1990 U.S. Dist. LEXIS 787 (E.D. Pa. Jan. 26, 1990).
H, P *	Lynch v. Belden and Co., Inc., 882 F.2d 262 (7th Cir. 1989)
H, M	McDaniel v. Fairman, 1989 U.S. Dist. LEXIS 14530 (N.D.Ill. Dec. 5, 1989).
H, M, DM	McGinnis v. Ingram Equipment Co. Inc., 888 F.2d 109 (11th Cir. 1989).
M, D	McKee v. Leininger Midstates Paving Co., 1989 U.S. Dist. LEXIS 15603 (N.D.Ill. Dec. 21, 1989).
P(2), M	Mayfield v. Nicon System, Inc., 1989 U.S. Dist. LEXIS 15964 (E.D. Tex. Oct. 16, 1989).
D	Meyers v. City of Cincinnati, 51 FEP Cas. 1458 (S.D. Ohio 1990).

H(2)	Miller v. Shawmut Bank of Boston, 726 F. Supp. 337 (D. Mass. 1989).
D, F	Mingle v. Piggly Wiggly Southern, Inc., No. CV687-010, slip op. (S.D. Ga. Dec. 19, 1989).
D, F	Mobley v. Piggly Wiggly Southern, Inc., No. CV687-66 slip op. (S.D. Ga. Dec. 19, 1989).
D	Owens v. Foot Locker, 1989 U.S. Dist. LEXIS 13574 (E.D. Pa. Nov. 14, 1989).
H, N7	Perry v. Command Performance, 1989 U.S. Dist. LEXIS 14258 (E.D. Pa. Nov. 22, 1989).
H	Pressley v. Haeger, 1989 U.S. Dist. LEXIS 13914 (N.D. Ill. Nov. 15, 1989).
D, R, F	Sherman v. Burke Contracting, Inc., 1989 U.S. App. LEXIS 520 (11th Cir. Jan. 15, 1990).
D	Singleton v. Kellogg Company, 1989 U.S. Dist. LEXIS 17920 (6th Cir. Nov. 29, 1989).
M	Snowden v. Millinocket Regional Hospital, 1990 U.S. Dist. LEXIS 252 (D. Me. Jan. 9, 1990).
D	Steward v. National Broadcasting Co., 1990 U.S. Dist. LEXIS 979 (N.D. Ill. Jan. 31, 1990).
D	Stinson v. American Sterilizer Co., 51 F.E.P. Cases 816 (M.D. Ala. 1989)
M	Teran v. El Paso Natural Gas Co., 51 F.E.P. Cases 423 (W.D. Tex. 1989)
D	Thompson v. Johnson & Johnson Management Information Center, 725 F. Supp. 826 (D.N.J. 1989).
M	Verhagen v. Olarte, 1989 U.S.Dist. LEXIS 13881 (S.D.N.Y. Nov. 17, 1989)
H(4), D(4), P(2), M(4)	White v. Federal Express Corp., 1990 U.S. Dist. LEXIS 1052 (E.D. Va. Jan. 30, 1990).
P	Williams v. Chase Manhattan Bank, 1990 U.S. Dist. LEXIS 327 (S.D.N.Y. Jan. 17, 1990).

NATIONAL WOMEN'S LAW CENTER

1616 P Street, NW • Washington, DC 20036 • (202) 328-5160 • FAX (202) 328-5137

March 14, 1990

HAND DELIVER

The Honorable Edward M. Kennedy
United States Senate
315 Russell Office Building
Washington, DC 20510

Dear Senator Kennedy:

Please find enclosed a copy of a study done by the law firm of Shea & Gardner on the extent of compensatory and punitive damages awarded under 42 U.S.C. § 1981 during the past 10 years. The National Women's Law Center respectfully requests that this study be included in the record of S.2104, the Civil Rights Act of 1990.

Thank you.

Sincerely,

Caroline Newkirk

Caroline Newkirk
Staff Attorney

CN:sj
Enclosure

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FRANCIS M. SHEA (1905-1988)

March 13, 1990

Marcia D. Greenberger, Esquire
National Women's Law Center
1616 P Street, N.W.
Suite 100
Washington, D.C. 20036

Dear Marcia:

You have asked us to research the case law for the past 10 years under 42 U.S.C. § 1981 (1982), in an effort to determine the extent to which compensatory and/or punitive damages have been awarded in those cases to successful claimants.

Enclosed is our report, entitled "Analysis of Damage Awards under Section 1981."

Sincerely yours,

Wendy S. White

WSW/jmr

Enclosure

ANALYSIS OF DAMAGE AWARDS UNDER SECTION 1981

INTRODUCTION

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e-2000e-17 (1982), prohibits employment discrimination on the basis of race, color, religion, sex or national origin. 42 U.S.C. §2000e-2(a). Employees who succeed on a Title VII claim are entitled to equitable relief including back and front pay, reinstatement, instatement, injunctive relief and attorney fees. 42 U.S.C. §2000e-5(g) and (k). Successful Title VII employees cannot, however, receive compensation for consequential damages for injuries resulting from the discrimination, such as medical expenses, nor are they entitled to punitive damages.

Employees also are protected from intentional employment discrimination on the basis of race under 42 U.S.C. §1981 (1982). In addition to equitable relief, Section 1981 awards compensatory and punitive damages. Thus, if an employee sues under both Title VII and Section 1981, compensatory and punitive damages would be available. Because, however, Section 1981 does not prohibit employment discrimination on all of the bases protected under Title VII, such as sex, even where an employer intentionally engages in unlawful sex discrimination, an employee is not entitled to compensatory or punitive damages.

Legislation entitled "The Civil Rights Act of 1990," S.2140/H.R.4000, 101st Cong., 2d Sess. (1990) (the 1990 Act), has recently been introduced in Congress. The purpose of the 1990 Act is to "amend the Civil Rights Act of 1964 to restore and strengthen civil rights laws that ban discrimination in employment ..." Preamble to the 1990 Act. In Title VII cases involving intentional discrimination, Section 8 of the 1990 Act states that compensatory damages may be awarded and, if an employer engages in an "unlawful employment practice with malice, or with reckless or callous indifference to the federally protected rights of others, punitive damages may be awarded."

The purpose of Section 8 is to ensure that remedies available to Title VII plaintiffs are equivalent to the remedies which are available to employees who sue under Section 1981. When looking at liability, courts have already held that, "[w]hen 42 U.S.C. §1981 and Title VII are alleged as parallel bases of relief, the same elements of proof are required for both actions." Flanagan v. Aaron E. Henry Community Health Services Center, 876 F.2d 1231, 1233-34 (5th Cir. 1989). Thus, since the standard for proving intentional discrimination would be the same for Section 1981 and Title VII, by examining damages which have been awarded in Section 1981 employment discrimination cases, it is possible to forecast the types of awards which could be rendered if Congress passes the 1990 Act.

We have reviewed Section 1981 employment discrimination claims decided in United States federal district courts and Courts of Appeals for the past ten years. In short, using the Section 1981 experience as a guide our research shows that, if Congress passes the 1990 Act:

(1) Most plaintiffs' claims for damages will fail for procedural or substantive reasons;

(2) Of those plaintiffs who do prevail, many will receive only equitable relief, which currently is available under Title VII;

(3) When a plaintiff does receive compensatory or punitive damages, the award will probably be moderate;

(4) If an employer engages in outrageous intentional discrimination, in a few cases, the plaintiff may receive a more substantial compensatory or punitive damages award; and

(5) If either a jury or court awards excessive compensatory or punitive damages, the award may well be reduced or reversed on appeal.

DISCUSSION

Our research included a total of 576 cases decided between 1980 and 1990. Of these cases, 144 settled, or were reversed or remanded, and no further information was available. In 314 cases, the claims either were dismissed before trial or a court or jury ruled that the plaintiff was not entitled to relief under Section 1981.

In the 118 remaining cases, the plaintiff proved that the employer intentionally engaged in unlawful racial discrimination. In 50 of these cases, however, plaintiffs did not receive any compensatory relief or punitive damages. Rather, the plaintiff received only back pay, front pay or other equitable remedies comparable to those currently available under Title VII. See Appendix B for a list of these cases. In many of these cases, compensatory or punitive damages were not awarded because the court specifically concluded that the remedies afforded under Title VII were sufficient to make the plaintiff whole for the damage suffered. See e.g., Walsdorf v. Board of Commissioners for The East Jefferson Levee District, 857 F.2d 1047, 1054 (5th Cir. 1988). Thus, because it is likely that Title VII plaintiffs will have experiences similar to Section 1981 plaintiffs, even if the 1990 Act is passed, our research demonstrates that, in a substantial number of cases, courts will continue to award only equitable relief.

From 1980 to the present, our research found that plaintiffs were awarded compensatory or punitive damages in 68 cases involving 91 claims.[1/] Of

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[1/] Some of the cases had more than one plaintiff.

the 65 claims where it is possible to determine the exact amount of the award,[2/] 42 of the combined compensatory and punitive damages awards were $50,000.00 or less. See Appendix A. In fact, in four cases, plaintiffs received nominal awards of less than $500.00.

Our research found five cases over the past ten years where judges or juries awarded substantial compensatory or punitive damages that were later found to be unwarranted.[3/] On appeal, these awards were either reduced or the entire case was reversed because of the amount of the award. Thus, in Vance v. Southern Bell Tel. and Tel. Co., 863 F.2d 1503 (11th Cir. 1989), a jury awarded $42,000.00 in back pay, $500,000.00 in front pay, $500,000.00 in compensatory damages and $2.5 million in punitive damages. The district court ruled that all of the damages awards were excessive and granted the defendant's motion for a new trial. The Court of Appeals affirmed the district court and remanded for a new trial stating that "the size of each of the damages awards when considered in light of the evidence presented supports the district court's grant of a new trial." 863 F.2d at 1516.

Similarly, in Stephens v. South Atlantic Canners, Inc., 848 F.2d 484 (4th Cir. 1988), a jury awarded $100,000.00 in compensatory damages and $85,000.00 in punitive damages. After reviewing the evidence, the Court of Appeals affirmed the compensatory damages award, but held that "our detailed review of the proceedings reveals no evidence which would support an award of punitive damages." Id. at 492 (footnote omitted). See also Ramsey v. American Air Filter Co., 772 F.2d 1303 (7th Cir. 1985); Rodgers v. Fisher Body Division,

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[2/] Because some of the awards combined back pay and compensatory damages and because many of the trials were bifurcated or the damages award was calculated later, we were unable to ascertain the amount of damages awarded in all cases.

[3/] These five cases appear on Appendix C.

739 F.2d 1102 (6th Cir. 1984); Rowlett v. Anheuser-Busch Inc., 832 F.2d 194 (1st Cir. 1987). These cases indicate that if a jury or a court awards excessive compensatory or punitive damages, the award can be corrected by a trial or appeals court.

In all of the cases we reviewed, we found only three cases, one of which is pending on Appeal, where a plaintiff was ultimately awarded in excess of $200,000.00 in compensatory and/or punitive damages. In Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194 (1st Cir. 1987), a jury awarded $123,000.00 in compensatory damages and $3 million in punitive damages. The Court of Appeals noted that the defendant discriminated against the plaintiff for over ten years, then terminated the plaintiff for "disloyalty" after he filed a discrimination claim with the New Hampshire Commission of Human Rights. 832 F.2d at 197. Because of these acts, the court ruled that the compensatory damages award was not grossly excessive. While the court felt that the punitive damages award needed to be substantial because "Anheuser-Busch is a substantial company [and] any amount adjudged must be sufficient to deter it or any other rational employer from repeating such conduct in the future," it did not feel that Anheuser-Busch's conduct warranted "$3 million worth of outrage." Id. at 206, 207. Accordingly, it reduced the $3 million award to $300,000.00.

Similarly, the court in Mitchell v. Keith, 752 F.2d 385 (9th Cir. 1985), awarded $500,000.00 in punitive damages. The plaintiff in this case was the first Equal Employment Opportunity Coordinator at one of General Motors Corporation's (GM) California plants. Although there were multi-defendants in this case, punitive damages were assessed only against General Motors Corporation. The Court of Appeals ruled that the amount was not excessive

because GM fired the plaintiff solely because of his efforts to protect the rights of minority employees.

Finally, in McKnight v. General Motors Corporation, 705 F.Supp. 464 (E.D. Wis. 1989), the plaintiff was awarded $500,000.00 in punitive damages. The jury found that the plaintiff was fired in retaliation for filing valid racial discrimination complaints in the past.[4/]

CONCLUSION

Our research demonstrates that, since 1980, victims of intentional employment discrimination have not received excessive damage awards under 42 U.S.C. §1981. Since courts use the same standards to examine intentional discrimination claims under Section 1981 and Title VII, we believe that the types of relief afforded in Section 1981 claims accurately reflect relief that would be awarded under the Civil Rights Act of 1990. Using the Section 1981 experience as a guide, our research shows that, if Congress passes the 1990 Act, most plaintiffs will receive neither compensatory nor punitive damages. Even if an employee proves that the employer engaged in intentional discrimination, unless an employer has engaged in outrageous, intentional conduct, compensatory

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4/ General Motors has appealed the jury verdict. The case was argued on February 12, 1990 in the United States Court of Appeals for the Seventh Circuit before Judges Posner, Easterbrook and Fairchild. It is currently under advisement.

and punitive damages awards will be moderate. Finally, if a judge or jury awards "excessive" damages, the award will be modified by another court.

Wendy S. White
Daniel W. Shelton
A. Mechele Dickerson
Shea & Gardner
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036

APPENDIX A

Section 1981 Cases In Which Compensatory and/or Punitive Damages Were Awarded: 1980-Present
Total = 68

Date Case Decided	Name of Case	Back Pay	Front Pay	Compensatory	Punitive	Additional
11/21/89	Jackson v. City of Albuquerque, 890 F.2d 225 (10th Cir. 1989)	Amount not reported	$50,000.00	$70,000.00	$70,000.00	Reinstatement
7/14/89	Gillespie v. First Interstate Bank of Wisconsin Southeast, 717 F. Supp. 649 (E.D. Wis. 1989)	$20,936.92 (plus prejudgment interest)		$50,000.00	$60,000.00 (district court reduced jury award of $100,000.00 as excessive)	
7/13/89	Flanagan v. Aaron E. Henry Community Health Services Center, 876 F.2d 1231 (5th Cir. 1989)			$50,000.00	$20,000.00	
6/5/89	Bempah v. Kroger Co., 51 FEP Cases 195 (S.D. Ga. 1989)	$1,731.00		$7,200.00		

Date Case Decided	Name of Case	Back Pay	Front Pay	Compensatory	Punitive	Additional
3/16/89	Johnson v. Philadelphia Electric Co., 709 F. Supp. 98 (E.D. Pa. 1989)	Amount not reported	Amount not reported	$10,000.00		
2/28/89	Jackson v. Pool Mortgage Company, 868 F.2d 1178 (10th Cir. 1989)	$49,725.00		$24,421.00		
2/2/89	Hopper v. Euclid Manor Nursing Home, 867 F.2d 291 (6th Cir. 1989)					$100.00
1/31/89	McKnight v. General Motors Corp., 705 F. Supp. 464 (E.D. Wis. 1989)	$55,000.00		$55,000.00	$500,000.00	Appeal pending in the Seventh Circuit
9/30/89	Carter v. Sedgwick County, Kansas, 705 F. Supp. 1474 (D. Kan. 1988)	$10,748.05	Yes or reinstate-ment	$100,000.00	$10,000.00	

Date Case Decided	Name of Case	Back Pay	Front Pay	Compensatory	Punitive	Additional
11/25/88	Erebia v. Crysler Plastic Products Corp., 863 F.2d 47 (table) (6th Cir. 1988) (Erebia II)	$1.00		$75,000.00	$55,000.00	Reversed to resolve issue of reinstatement
9/2/88	Edwards v. Jewish Hospital of St. Louis, 855 F.2d 1345 (8th Cir. 1988)			$1.00	$25,000.00	
7/22/88	Cowan v. Prudential Insurance Co. of America, 852 F.2d 688 (2d Cir. 1988)			$15,000.00		
6/7/88	Hernandez v. Hill Country Telephone Cooperative, Inc., 849 F.2d 139 (5th Cir. 1988)			$5,000.00		
4/25/88	Few v. Yellow Freight System, Inc., 845 F.2d 123 (6th Cir. 1988)			$10,000.00	$5,000.00	
4/12/88	Zaklama v. Mt. Sinai Medical Center, 842 F.2d 291 (11th Cir. 1988)			$85,000.00	$50,000.00	

Date Case Decided	Name of Case	Back Pay	Front Pay	Compensatory	Punitive	Additional
4/11/88	Wade v. Orange County Sheriff's Office, 844 F.2d 951 (2d Cir. 1988)	$2,100.00		$50,000.00		"Out-of-pocket-loss" $2,000.00
12/8/87	Reeder-Baker v. Lincoln National Corporation, 834 F.2d 1373 (7th Cir. 1987)	$25,665.49	$26,760.00	$10,000.00	$25,000.00	Prejudgment interest - $1,043.76
9/30/87	Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194 (1st Cir. 1987)	$176,000.00		$123,000.00	$300,000.00 (First Circuit reduced jury award of $3 million as excessive)	
9/11/87	Collins v. Illinois, 830 F.2d 692 (7th Cir. 1987)			Remanded to acertain the amount		
8/24/87	Richards v. New York City Board of Education, 668 F. Supp. 259 (S.D.N.Y. 1987), aff'd w/out opinion, 842 F.2d 1289 (2d Cir. 1988)	Not reported		$15,000.00		Promotion to next available position of commensurate responsibility and pay.

Case Decided	Name of Case	Back Pay	Front Pay	Compensatory	Punitive	Additional
[illegible]/87	Marsh v. Digital Equipment Corp., 675 F. Supp. 1186 (D. Ariz. 1987)	$34,642.45 (plus prejudgment interest)		$15,000.00	$50,000.00	
[illegible]/20/87	Wyatt v. Security Inn Food & Beverage, Inc., 819 F.2d 69 (4th Cir. 1987) [three plaintiffs]			$1.00 $1.00 $1.00	$15,000.00 $15,000.00 $15,000.00	
5/4/87	Williamson v. Handy Button Machine Co., 817 F.2d 1290 (7th Cir. 1987)	$130,000.00 (May include future earnings)		$20,000.00	$100,000.00	
4/2/87	Johnson v. Armored Transport of California, Inc., 813 F.2d 1041 (9th Cir. 1987)			$45,000.00	$150,000.00 (plaintiff agreed to reduce jury award from $250,000.00 rather than face a new trial)	
1/26/87	Brown v. Freedman Baking Co., 810 F.2d 6 (1st Cir. 1987) [three plaintiffs]	$22,000.00 $ 4,000.00 $ 1,000.00			$53,000.00 $54,000.00 $54,000.00	

Date Case Decided	Name of Case	Back Pay	Front Pay	Compensatory	Punitive	Additional
11/10/86	Walters v. City of Atlanta, 803 F.2d 1135 (11th Cir. 1986)			$150,000.00	$2,000.00	Instatement
7/30/86	Hunter v. Allis-Chalmers Corp., 797 F.2d 1417 (7th Cir. 1986)	Amount not reported		$25,000.00	$25,000.00	
6/16/86	Boyd v. SCM Allied Paper Co., 42 FEPCases 1643 (N.D. Ind. 1986)	$17,615.34	(To be paid if immediate reinstate-ment impos-sible)	$5,000.00		Reinstate-ment; $3,226.19 (prejudgment interest)
6/9/86	Wilmington v. J.I. Case Co., 793 F.2d 909 (8th Cir. 1986)	Jury awarded $400,000.00 in "actual damages" to include back pay, future earnings and emotional distress			$40,000.00	Future earnings

Date Case Decided	Name of Case	Back Pay	Front Pay	Compensatory	Punitive	Additional
4/23/86	Yarbrough v. Tower Oldsmobile, Inc., 789 F.2d 508 (7th Cir. 1986)			$29,500.00 (May include back pay)	$7,500.00	
12/11/85	Stallworth v. Shuler, 777 F.2d 1431 (11th Cir. 1985)			$100,000.00	$1,000.00	
10/23/85	Anderson v. Group Hospitalization, Inc., 621 F. Supp. 943 (D.D.C. 1985), aff'd in relevant part, 820 F.2d 465 (D.C. Cir. 1987)			$100,000.00 (includes back pay)		Reinstatement; injunction against further discrimination.
10/21/85	Moffett v. Gene B. Glick Co., 621 F. Supp. 244 (N.D. Ind. 1985)	$10,895.00		$66,640.00	$15,000.00	Corporate defendant entitled to $50,000.00 credit which represents settlement amount with individual defendants; $1,275.24 (interest)

Date Case Decided	Name of Case	Back Pay	Front Pay	Compensatory	Punitive	Additional
9/17/85	Foster v. MCI Telecommunications Corp., 773 F.2d 1116 (10th Cir. 1985)	Amount not reported		$50,000.00		
8/30/85	Ramsey v. American Air Filer Co., Inc., 772 F.2d 1303 (7th Cir. 1985)	$37,486.00		$35,000.00 (Seventh Circuit reduced award from $75,000.00)	$20,000.00 (Seventh Circuit reduced award from $150,000)	
7/9/85	Rosemond v. Cooper Industrial Products, 612 F. Supp. 1105 N.D. Ind. 1985)	$8,550.02		$500.00		Employment records expunged
6/7/85	Erebia v. Chrysler Plastic Products Corp., 772 F.2d 1250 (6th Cir. 1985) (Erebia I)			Nominal ($10,000.00 award vacated.)	$30,000.00	
6/6/85	Alston v. Blue Cross, 37 FEP Cases 1792 (E.D.N.Y. 1985)	$17,422.00 (includes prejudgment interest)	$36,658.00 (includes prejudgment interest)	$90,000.00		

Date Case Decided	Name of Case	Back Pay	Front Pay	Compensatory	Punitive	Additional
4/16/85	Grubb v. W.A. Foote Memorial Hosp., Inc., 759 F.2d 546 (6th Cir. 1985)	$57,689.60	Amount not reported	$25,000.00		$1,560.00 (out-of-pocket expenses); $19,758.59 (Interest); Reinstatement
3/22/85	Easley v. Anheuser-Busch, Inc., 758 F.2d 251 (8th Cir. 1985) [three plaintiffs]	Amount not reported		$500.00		
1/21/85	Mitchell v. Keith, 752 F.2d 385 (9th Cir. 1985)	$30,000.00		$20,000.00	$500,000.00	
10/4/84	Easley v. Northern Shipping Co., 597 F. Supp. 954 (E.D. Pa. 1984)	$2,862.70		$1.00		
9/27/84	Abasiekong v. City of Shelby, 744 F.2d 1055 (4th Cir. 1984)			$10,000.00		

Date Case Decided	Name of Case	Back Pay	Front Pay	Compensatory	Punitive	Additional
7/13/84	Rodgers v. Fisher Body Div., 739 F.2d 1102 (6th Cir. 1984)			(Sixth Circuit vacated $300,000.00 award as excessive)	(Sixth Circuit vacated $500,000.00 award as excessive)	
6/27/84	Poolaw v. City of Anadarko, Okl., 738 F.2d 364 (10th Cir. 1984)					Actual damages - $10,000.00 (This amount may include back pay)
5/2/84	EEOC v. Gaddis, 733 F.2d 1373 (10th Cir. 1984)			$18,225.00 (This amount includes back pay & punitive damages)		
4/18/84	Dickerson v. City Bank & Trust Co., 46 FEP Cases (1313 (D. Kan. 1984)			$2,145.00 (may include back-pay)	$10,000.00	
4/5/84	EEOC v. Inland Marine Industries, 729 F.2d 1229 (9th Cir. 1984)	$268.85		$500.00		

Date Case Decided	Name of Case	Back Pay	Front Pay	Compensatory	Punitive	Additional
2/21/84	Muldrew v. Anheuser-Busch, Inc., 728 F.2d 989 (8th Cir. 1984)	$72,355.20		$52,644.80		
2/17/84	Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225 (D.C. Cir. 1984)			$10,000.00 (This amount includes back pay)		
1/9/94	Gates v. ITT Continental Baking Co., 581 F. Supp. 204 (N.D. Ohio 1984)	$51,877.00		$35,000.00		Reinstatement; fringe benefits
10/28/83	Poindexter v. Kansas City, Missouri Water Dept., 573 F. Supp. 647 (W.D. Mo. 1983), aff'd w/out opinion, 754 F.2d 377 (8th Cir. 1984)	Amount not reported		Amount not reported	Amount not reported	
8/26/83	Goldsmith v. E.I. de Pont de Nemours & Co., 571 F. Supp. 235 (D. Del. 1983)			$10,000.00		

Date Case Decided	Name of Case	Back Pay	Front Pay	Compensatory	Punitive	Additional
8/22/83	Jackson v. Wakulla Springs & Lodge, 33 FEP Cases 1301 (N.D. Fla. 1983) [five plaintiffs]	$14,719.90 $10,854.00 $14,070.00 $ 7,822.55 $ 4,786.80		$3,000.00 $5,000.00 $3,000.00 $3,000.00 $5,000.00	$5,000.00 $5,000.00 $5,000.00 $5,000.00 $5,000.00	
7/19/83	Block v. R.H. Macy & Co., 712 F.2d 1241 (8th Cir. 1983)	$7,598.00		$12,402.00	$60,000.00	
11/22/82	Cooper v. Department of Administration, State of Nevada, 558 F. Supp. 244 (D. Nev. 1982)			$10,000.00		
9/23/82	Irving v. Dubuque Packing Co., 689 F.2d 170 (10th Cir. 1982)			$20,000.00		

Date Case Decided	Name of Case	Back Pay	Front Pay	Compensatory	Punitive	Additional
5/28/82	Metrocare v. Washington Metropolitan Area Transit Authority, 679 F.2d 922 (D.C. Cir. 1982) [four plaintiffs]	Amount not reported (District of Columbia Circuit reinstated unspecified jury verdicts for four individual plaintiffs)		Amount not reported		
11/20/81	Axup v. Wade, 28 FEP Cases 1045 (C.D. Ca. 1981) [seven plaintiffs]			Amount not reported		
11/19/81	Acosta v. University of the District of Columbia, 528 F. Supp. 1215 (D.D.C. 1981)			$7,500.00 (may include back or front pay)		
10/2/81	Williams v. Trans World Airlines, 660 F.2d 1267 (8th Cir. 1981)			Amount not reported		Reinstatement
9/30/81	Croker v. Boeing Co., 662 F.2d 975 (3d Cir. 1981) [three plaintiffs]			$15,050.00 $ 3,550.00		

Date Case Decided	Name of Case	Back Pay	Front Pay	Compensatory	Punitive	Additional
6/17/81	Lehman v. Yellow Freight Systems, Inc., 651 F.2d 520 (7th Cir. 1981)			Amount not reported		Reinstatement; retroactive seniority
5/31/81	Reese v. Batesville Casket Co., 25 FEP Cases 1472 (D.D.C. 1981) [two plaintiffs]			$240,000.00 (includes loss of future earings) $60,000.00		
1/26/81	Richardson v. Restaurant Marketing Associates, 527 F. Supp. 690 (N.D. Cal. 1981) [two plaintiffs]	Amount not reported		$10,000.00 $10,000.00		
12/5/80	Eubanks v. Pickens-Bond Constr. Co., 635 F.2d 1341 (8th Cir. 1980) [class action]			$16,854.00		
8/18/80	Fisher v. Dillard University, 499 F. Supp. 525 (E.D. Ga. 1980)	$11,127.00 (plus pre-judgment interest)		$50,000.00	$10,000.00	
2/25/80	Crawford v. Roadway Express, Inc., 485 F. Supp. 914 (W.D. Ga. 1980)	$17,015.55		$26,793.00		

APPENDIX B

Cases Where Plaintiff Prevailed on Section 1981 Claim But Neither Compensatory Nor Punitive Damages Were Awarded
TOTAL = 50

Abron v. Black & Decker (US) Inc., 654 F.2d 951 (4th Cir. 1981)

Albright v. Longview Police Dept., 884 F.2d 835 (5th Cir. 1989)

Berger v. Iron Workers Reinforced Rodmen Local 201, 843 F.2d 1395, supplemented by, 852 F.2d 621 (D.C. Cir. 1988)

Brady v. Thurston Motor Lines, Inc., 753 F.2d 1269 (4th Cir. 1985)

Bridgeport Guardians, Inc. v. Delmonte, 553 F.Supp. 601 (D. Conn. 1982)

Briseno v. Central Technical Community College Area, 739 F.2d 344 (8th Cir. 1984)

Brown v. Eckerd Drugs, Inc., 564 F.Supp. 1440 (D. N.C. 1983)

Bunch v. Bullard, 795 F.2d 384 (5th Cir. 1986)

Calloway v. Westinghouse Electric Corp., 642 F.Supp. 663 (M.D. Ga. 1986)

Cunico v. Pueblo School Dist. No. 60, 693 F.Supp. 954, supplemented by 705 F.Supp. 1466 (D. Colo. 1988)

Dacus v. Southern College of Optometry, 657 F.2d 81 (6th Cir. 1981)

Dougherty v. Barry, 869 F.2d 605 (D.C. Cir. 1989)

Eddins v. West Georgia Medical Center, Inc., 629 F.Supp. 753, supplemented by, 39 F.E.P.C. 1499 (N.D. Ga. 1985), aff'd in part without opinion, 795 F.2d 88 (11th Cir. 1986)

Figgs v. Quick Fill Corp., 766 F.2d 901 (5th Cir. 1985)

Freeman v. Michigan Dept. of State, 808 F.2d 1174 (6th Cir. 1987)

Freeman v. Motor Convoy, Inc., 700 F.2d 1339 (11th Cir. 1983)

Gilbert v. City of Little Rock, 867 F.2d 1063 (8th Cir. 1989)

Goodlett v. Rhodes Furniture Co., 26 F.E.P.C. 1400 (N.D. Ga. 1981)

Grant v. Bethlehem Steel Corp., 622 F.2d 43 (2d Cir. 1980)

Gunby v. Pennsylvania Elec. Co., 840 F.2d 1108 (3d Cir. 1988)

Hameed v. International Ass'n of Bridge, Structural and Ornamental Iron Workers, Local Union No. 396, 637 F.2d 506 (8th Cir. 1980)

Hamilton v. Rodgers, 791 F.2d 439 (5th Cir. 1986)

Harris v. Richards Mfg. Co., 675 F.2d 811 (6th Cir. 1982)

Haynes v. Miller, 669 F.2d 1125 (6th Cir. 1982)

Heard v. Golden Flake Snack Foods, Inc., 652 F.Supp. 282 (N.D. Ala. 1986), aff'd without opinion, 834 F.2d 1027 (11th Cir. 1987)

Jackson v. Missouri Pacific R. Co., 803 F.2d 401 (8th Cir. 1986)

Johnson v. Chapel Hill Independent School Dist., 853 F.2d 375 (5th Cir. 1988)

Lilly v. Harris-Teeter Supermarket, 842 F.2d 1496 (4th Cir. 1988)

Louisville Black Police Officers Org. v. City of Louisville, 700 F.2d 268 (6th Cir. 1983)

Marks v. Prattco, Inc., 633 F.2d 1122 (5th Cir. 1981)

McAlester v. United Air Lines, Inc., 851 F.2d 1249 (10th Cir. 1988)

Mitchell v. OsAir, Inc., 629 F.Supp. 636 (N.D. Ohio 1986)

N.A.A.C.P. v. City of Evergreen, Ala., 693 F.2d 1367 (11th Cir. 1982)

Padilla v. United Air lines, 716 F.Supp. 485 (D. Colo. 1989)

Payne v. Travenol Labs., Inc., 673 F.2d 798 (5th Cir. 1982)

Roman v. Niagara Frontier Transit Metro System, Inc., 30 F.E.P.C. 1345 (D. Colo. 1983)

Royal v. Bethelehem Steel Corp., 636 F.Supp. 833 (E.D. Tex. 1986)

Satterwhite v. Smith, 744 F.2d 1380 (9th Cir. 1984)

Savage v. McAvoy, 26 F.E.P.C. 114 (S.D. Ohio 1980)

Scroggins v. Kansas, 802 F.2d 1289 (10th Cir. 1986)

Skinner v. Total Petroleum, Inc., 859 F.2d 1439 (10th Cir. 1988)

Smith v. American Service Co. of Atlanta, Inc., 611 F.Supp. 321 (N.D. Ga. 1984)

Spiva v. Copperweld Steel Co., 22 F.E.P.C. 900 (N.D. Ohio 1980)

Taylor v. Jones, 653 F.2d 1193 (8th Cir. 1981)

Walsdorf v. Board of Commissioners for the East Jefferson Levee District, 857 F.2d 1047 (5th Cir. 1988)

Weatherspoon v. Andrews & Co., 32 F.E.P.C. 1226 (D. Colo. 1983)

Whatley v. Skaggs Companies, Inc., 707 F.2d 1129 (10th Cir. 1983)

Whiting v. Jackson State University, 616 F.2d 116 (5th Cir. 1980)

Williams v. Owens-Illinois, Inc., 665 F.2d 918 (9th Cir 1982)

Wilmington Firefighters Local 1590 v. City of Wilmington, 40 E.P.D. ¶ 36, 361 (D. Del. 1986)

APPENDIX C

Cases Where Section 1981 Damages Were Reversed or Reduced as Excessive
TOTAL = 5

Ramsey v. American Air Filter Co., 772 F.2d 1303 (7th Cir. 1985)	Court of appeals reduced $75,000.00 compensatory damage award to $35,000.00 and reduced $150,000.00 punitive damage award to $20,000.00.
Rodgers v. Fisher Body Division, 739 F.2d 1102 (6th Cir. 1984)	Court of appeals remanded for trial solely on the issue of damages. The jury originally awarded $300,000.00 in compensatory damages and $500,000.00 in punitive damages.
Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194 (1st Cir. 1987)	Court of appeals affirmed $123,000.00 award for emotional distress and it reduced the $3 million punitive damage award to $300,000.00.
Vance v. Southern Bell Telephone and Telegraph Co., 863 F.2d 1503 (11th Cir. 1989)	Court of appeals remanded for a new trial because it found the following awards to be excessive: $42,000.00 in back pay; $500,000.00 in front pay; $500,000.00 compensatory damage award; and, $2,500,000.00 punitive damage award.
Stephens v. South Atlantic Canners, Inc., 848 F.2d 484 (4th Cir. 1988)	Court of appeals remanded for a new trial. The jury originally awarded $100,000.00 in compensatory damages and $85,000.00 in punitive damages.

APPENDIX D

Summary of Cases Researched

Total Number of Cases Researched:	576
Total Number of Cases Which Were Dismissed or Plaintiff Lost at Trial:	314
Total Number of Cases Where the Disposition is Unknown:	144
Total Number of Cases Where Plaintiff Proved Intentional Discrimination:	118
Total Number of Cases Where Plaintiff Recovered Only Equitable Relief:	50
Total Number of Cases Where Plaintiff Received Compensatory Relief or Punitive Damages:	68

PREPARED STATEMENT OF RONALD M. GREEN, ESQ.

Mr. Chairman and Members of the Committee:

I am Ronald M. Green, a partner in the New York and Washington offices of the national law firm of Epstein Becker & Green. I would like to thank the Committee for inviting me to present my views on the important legislation now pending. The discussion that follows reflects my own views and are not necessarily those of Epstein Becker & Green. But they do reflect a long-standing belief in the fair implementation of this nation's strong commitment to equal employment opportunity.

I have been actively involved in the law of equal employment opportunity for over twenty years, beginning as a member of the Solicitor's office in the U.S. Department of Labor, where I was a part of the team that drafted the regulations implementing Executive Order No. 11246, which requires that employers with government contracts develop affirmative action plans.

After government service, I entered the private practice of law, counseling employers on achieving compliance with not only the Executive Order, but with the full array of fair employment statutes, federal and state, and litigating equal employment issues on their behalf. In this capacity, I have been involved in matters arising under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e st seq., from advising clients as to the requirements of the act and teaching and training in a variety of programs, to responding to charges, participating in conferences with the Equal Employment Opportunity Commission ("EEOC") or equivalent state or local agencies, engaging in conciliation, litigating in the federal

and state courts, and settling allegations of discrimination. I also have had significant experience in addressing claims under the Civil Rights Act of 1866, 42 U.S.C. § 1981 ("Section 1981"), which, as Members of the Committee are aware, does not offer the same administrative process as Title VII but becomes manifest only after a complaint of discrimination has been filed in court.

In addition to the practice of employment law, I also devote a substantial amount of time to teaching and writing on the subject of equal employment opportunity. I am a member of the adjunct faculty of the Cornell University New York State School of Industrial and Labor Relations, where I teach, among other things, a basic course on employment discrimination, focusing on Title VII and Section 1981. I also provide in-house training for clients, lecture at trade group conferences and conventions, and participate as a member of the faculty for a number of not-for-profit and proprietary organizations where I teach employment law. And I have had the singular honor of discussing Title VII, Section 1981, and other federal nondiscrimination statutes with the judges of the U.S. Court of Appeals for the Fourth Circuit as a guest panelist for the Judicial Conference.

My views on the subject of these hearings, the proposed Civil Rights Act of 1990, thus are based on over twenty years experience in all facets of employment law, with a strong focus on Title VII and Section 1981. They are based further on an appreciation of Title VII and the effect it has had on the workplace.

But to state the matter directly and simply, the proposed Civil Rights Act of 1990 eviscerates the underlying purpose of Title VII as enacted by Congress in 1964 and as amended subsequently. That is to say, the changes suggested in S.2104 in its current form would undermine what Congress long ago designed and what has worked effectively for over twenty-five years. Title VII was designed, in substantial part, to get those economically disenfranchised into the workforce and to allow them to advance therein based on their demonstrated competence subject to non-discriminatory assessments. If a person had a job, Title VII was intended to make sure that they had a fair chance to compete, i.e., ensure a level playing field. Title VII was not designed to offer simply another punitive tort-style remedy where a plaintiff can "score the big hit."

It would not be overstating the matter to suggest that if it were the intent of this bill to further encumber the federal docket, to encourage the active litigation of even more discrimination cases in the federal courts, and to remove as many cases from state courts to federal courts, thus slowing the process of resolving allegations of discrimination within the federal judicial system, then the bill as drafted is on the mark. But if we truly are concerned with the prompt and fair resolution of charges alleging discrimination, then we should proceed cautiously as we revisit Title VII and Section 1981.

Title VII was careful legislation that reflected a series of compromises worked out in Congress between a number of competing interests. On the one hand, the act prohibits discrimination on

the basis of race, color, religion, national origin, and sex in clear and unambiguous terms. But on the other hand, the act also provides for an administrative process that encourages the resolution of discrimination allegations through a required prompt filing of charges to either the EEOC or an equivalent state or local agency. If a charge is found meritorious, Title VII next provided for non-adjudicative conciliation. Only if conciliation fails would a charge become ripe for litigation. Over fifteen years ago, the Supreme Court recognized the importance of the scheme Congress established:

> Congress enacted Title VII . . . to ensure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin. Cooperation and voluntary compliance were selected as the preferred means for achieving this goal. To this end, Congress established the Equal Employment Opportunity Commission and established a procedure whereby existing state and local agencies, as well as the Commission, would have the opportunity to settle disputes through conference, conciliation, and persuasion, before the aggrieved party was permitted to file a lawsuit.

Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) (citations omitted). As the Court further noted, when Congress amended the act in 1972, it was in part "to promote voluntary compliance with the requirements of Title VII . . . ." *Id.* *Accord Great American Savings v. Novotny*, 442 U.S. 366, 373-74 (1979) ("At several different points, the statutory plan prevents immediate filing of judicial proceedings to encourage voluntary conciliation."); *see also Grimes v. Pitney Bowes Inc.*, 480 F. Supp. 1381, 1384 (N.D. Ga. 1979) ("The

legislative history of the original statute as well as the 1972 amendments reflects Congress' belief that the commission can effect a resolution superior to that of private litigation in most cases.")

Essential to the promotion of voluntary compliance are the procedures provided in the act and the remedies available to prevailing parties. Specifically, because those who believe that they have been the victims of discrimination are required to file charges with the EEOC within a reasonable time frame and ultimately, should they prevail, may be limited in the equitable relief they may obtain (that is, a job, back pay, reinstatement, or other job-specific relief), there is some incentive to resolve allegations quickly. In my experience, the charges that we are able to resolve in an expedited fashion not only benefit my clients because their legal fees are kept low and settlements are in keeping with actual injury or loss, but they benefit the charging party as well. Too often, especially for those litigants who allege non-statutory allegations in addition to a Title VII charge, one becomes so involved in a lawsuit that he or she loses sight of life. The case becomes their principal passion.

It is my belief that the legislation as a whole constitutes a serious challenge to the essence of Title VII. At the request of the Committee, I will focus the predominant portion of my testimony to several key sections of S.2104: section 5, which is designed to address issues raised in *Price Waterhouse v. Hopkins*, 109 S. Ct 1775 (1989); section 8, which permits recovery of compensatory and punitive damages and adds the right to a trial by jury to Title

VII; and section 12, which enlarges Section 1981 and is reactive of *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989).

Price Waterhouse v. Hopkins

In *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989), the Supreme Court held that an employer had to prove by a preponderance of the evidence that in a mixed motive case it relied on valid reasons in making an employment decision. A mixed motive case is one where an employer is proven to have used both proper and improper criteria in making an employment decision. According to the Court, in an opinion authored by Justice Brennan, where the plaintiff proves that the employer in fact considered impermissible factors in making an employment decision--that is, that such factors "motivated" the employers actions--it may avoid liability if it can prove, by a preponderance of the evidence that it would have made the same decision based solely on legitimate reasons.

> [O]nce a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role.

Id. at 1787-88. Elsewhere, Justice Brennan reiterated the point:

> In deciding as we do today, we do not traverse new ground. . . . [O]ur assumption always has been that if an employer allows gender to affect its decisionmaking process, then it must carry the burden of justifying its ultimate decision. We have not in the past required women whose gender has proved relevant to an employment decision to establish the negative proposition that they would not have been subject to that decision had they been men, and we do not do so today.

Id. at 1789. If the employer is able to prove, by a preponderance of the evidence that it would have made the same decision absent consideration of gender (or race, religion, and so forth), based on other factors actually considered at the time, then the employer suffers no liability: "The employer . . . must show that its legitimate reason, standing alone, would have induced it to make the same decision." *Id.* at 1792.

Although Justice Brennan's opinion reflected the views of only himself and three other Justices, the opinions of Justices White and O'Connor indicate that a majority of the Court recognizes that once a plaintiff proves that an employment decision reflected a combination of reasons, some legal and others not, the employer's obligation is to prove that the legal predicate for its decision would have been sufficient to support its actions. (Justices White and O'Connor would have required evidence that gender was a "substantial factor" in the employer's decision.) Once an employer offers such evidence in support of its actions, it would prevail in its dispute with the plaintiff.

Essentially, what the Court recognized was that in at least some mixed motive cases, a plaintiff may not have suffered any injury encompassed within Title VII as a result of the employer's conduct. Title VII was intended to promote nondiscriminatory decision making and to support certain protected parties from consequences following consideration of impermissible criteria. Where an employer proves that it would have made the same decision absent consideration of gender, race, or other similar factors, the

plaintiff simply has not been the victim of impermissible discrimination and has suffered no injury from the employer's actions. To be sure, this is not--and appropriately not--an easy burden to meet. The Court made clear its position that only those factors actually considered at the time the original decision was made may be considered in assessing an employer's defense; after-the-fact rationalizations proffered to support a decision would not be relevant.

As drafted, section 5 of S.2104 states that an employer commits an unlawful employment practice if an individual's race, color, sex, religion, or national origin constitutes *a* "motivating factor" when making an employment decision. The bill takes Justice Brennan's "motivating factor" test and converts it from simply being the test for determining whether an impermissible motivating factor *shifts* the burden of proof to the test whether the plaintiff has *met* her ultimate burden of proof. Once the plaintiff proves that impermissible considerations constituted such *a* motivating factor the only issue remaining for the court will be the extent of damages. The plaintiff would be considered a "prevailing party" for purposes of relief. It will, of course, become routine for plaintiffs to characterize virtually every claim as involving mixed motives.

Any opportunity for the employer to fully and fairly defend itself from a finding of discrimination is substantially impaired. Moreover, notwithstanding the strong possibility that the alleged victim of discrimination may have suffered no actual job-related injury, the employer may be liable, under the "new" Title VII, if

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amended in accordance with the bill, for compensatory and punitive damages, attorneys' fees, and other costs. The bill states that the employer need not hire, promote, or provide other affirmative relief to the plaintiff if it establishes that it would have taken the same action absent consideration of the impermissible factor, but this hardly restores the proper balance to Title VII that was central to Congress in 1964 and again in 1972.

I currently am defending a major multinational employer from a charge of sex discrimination. The plaintiff, a woman, left her job with the company and filed suit alleging, among other things, constructive discharge and sex bias in overtime assignments. She alleges a "classic" case of mixed motive, that her employer, through a supervisor, considered her gender as well as lawful neutral criteria such as seniority in making various assignments entailing overtime. After several months and completion of discovery, it became clear to her that the discharge allegation was wholly without merit and she dropped it. The remaining issue thus is the overtime question, and her case rests on several alleged statements she attributes to her supervisors. Not much money is at stake. This is the type of case that generally settles, not because the company believes it is liable but because it does not make sense, to either plaintiff or defendant, to try the case. Moreover, from the court's perspective, settlement would be preferable to trying this case, tying up an available federal courtroom and federal judge--both scarce commodities these days--for up to a week, in which monetary recovery, should the plaintiff prevail, would be minimal.

If this case were to be tried under a revised Title VII, a plaintiff's settlement demand likely would be extremely high--perhaps six figures, given the expanded range of potential recovery. That is, if settlement were a viable option at all. For a plaintiff might well consider it a risk worth taking that she could convince the court, or a jury should S.2104 be adopted in its entirety, that the employer actually considered her gender when making overtime assignments. Even if the employer proves that it would have made the same assignments regardless of gender, she would prevail and she would be entitled to monetary damages.

In a case decided last August, an Illinois district court found that a company discriminated against a woman when it discharged her from her position as a laborer-escort at a construction site. *Jones v. Jones Bros. Constr. Co.*, 716 F. Supp. 1122 (N.D. Ill. 1989). The court based its determination on the availability of laborer positions at the worksite and the apparent disfavor with which a supervisor at the worksite viewed women in construction jobs. What is interesting about this case is an implicit finding that the supervisor had valid reasons for removing the plaintiff from the escort position in the first instance: the court found that the supervisor's attitude towards women affected his actions, but that he did have--and relied on--a legitimate reason for removing the plaintiff from the escort job. Had this been the only issue, the plaintiff would not have prevailed; the court noted that the employer's nondiscriminatory reason fully supported its actions.

Under the proposed Title VII amendment, however, the plaintiff in *Jones* would be entitled to recover damages from the employer. Notwithstanding the lack of actual injury related to discrimination, a court--and perhaps a jury--would judge whether to award the plaintiff damages. Would such a windfall be warranted? Title VII was not intended to operate like a lottery and award contestants lucky enough to have cases heard by a jury. Rather, it was designed to ensure that employment decisions were based on valid criteria. In *Jones*, the plaintiff would have lost her escort job for legitimate reasons and that is all Title VII properly asks for.

In another case, involving an allegation of age discrimination under the Age Discrimination in Employment Act, as amended, 29 U.S.C. § 621 et seq., the Eight Circuit Court of Appeals held that the trial court improperly granted the defendant's summary judgment motion. *Perry v. Kunz*, 878 F.2d 1056 (8th Cir. 1989). At issue was whether the plaintiff's age (65) was a motivating factor in the employer's action. A state employee, the plaintiff lost her appeal to the Missouri Personnel Advisory Board, which found that she had been dismissed because she was "'incompetent, inadequate, careless or inefficient, in the performance of her work duties and that she failed to meet [the] minimum standards required of her job.'" *Id.* at 1057. The district court held that it was precluded from retrying the matter following the Board's decision.

Although the Eight Circuit agreed with the district's preclusion argument, it held that preclusion would foreclose only an allegation based on the *McDonnell Douglas/Burdine* test, baring her from

establishing a prima facie case under that theory. Here, however, the plaintiff also alleged direct evidence of age discrimination and the court held that following such a showing, the plaintiff makes out a prima facie case of discrimination and the burden of proof shifts to the defendant, who may well present the same evidence that the Board found so persuasive.

If the defendant in *Perry* convinces the court that it in fact acted adversely toward the plaintiff because of her work performance, it would prevail and the plaintiff would not be entitled to any relief. Quite simply and correctly, she would not be considered the victim of discrimination. Under S.2104, however, and assuming the case arose under Title VII, once the plaintiff presented direct evidence that an impermissible criteria constituted *a* motivating factor, all the evidence in the world one could muster of her incompetence, inadequacy, carelessness, or inefficiency would not alter her status as a prevailing party and her entitlement to relief. Although the bill would not compel the employer to rehire the plaintiff, it would grandly reward her even though it was clear that the employer's decision to terminate her employment was wholly justified.

I would suggest to this Committee that the balancing of interests that Justice Brennan performed in his *Price Waterhouse* opinion is more consistent with the original balance Congress struck in enacting Title VII in 1964. His goal, as was Congress's, was ensuring that the ultimate basis for an employment decision be predicated on valid grounds. If not, Title VII provides a remedy

designed to place the injured party where he or she should have been. Under S.2104, the balance undergoes a dramatic shift. Yet, there is no evidence that Justice Brennan's opinion has had the effect of denying those suffering the adverse consequences of impermissible employer actions their day in court and their right to be treated in accordance with the fair employment dictates of Title VII.

Damages, Jury Trials

If I may, I would like to change my focus now to section 8 of the proposed Civil Rights Act of 1990, which would add compensatory and punitive damages and jury trials to Title VII. It is my opinion, based not only on my Title VII experience but also my experience in trying non-Title VII cases where juries are part of the process, that these provisions would alter substantially the character of Title VII without increasing in any meaningful way the protections offered under the act.

But first, I would like to share with you something I read recently on page A-8 of the February 23, 1990 *Washington Post*, which Members of the Committee may have seen. President Bush addressed the problem of medical malpractice and the ever escalating awards tendered against physicians. The article quotes the president as pledging the federal government's assistance in restoring "common sense and fairness to America's malpractice system." He informed his audience of his request that members of his administration study the effect of the problem on medical care. The article further cited an American Medical Association study indicating that

excessive jury awards, insurance, and medical tests cost the economy *$14 billion* a year.

In another article that I read recently, also on an issue relating to our litigious society, *Business Week* reported that upwards of five percent of the country's gross national product is spent on product liability litigation alone. We have become a people driven by confrontation and litigation, a perilous and foolhardy course.

Adding juries and nonequitable damages to Title VII invites the type of escalation in awards to plaintiffs in employment discrimination litigation that we have seen in medical malpractice and product liability. And it takes little imagination to project the potential long term effect that increasing awards will have on the business sector. For just as medical costs have risen in response to the increase in jury awards and insurance prices, so too, I am convinced, would the cost of doing business.

I recognize that juries and compensatory and punitive damages are available in other employment-related causes of action. I have tried age discrimination cases to juries as well as cases alleging, among other grounds, negligence in hiring or termination, defamation or other torts. Let me share with you some observations.

When I teach employment law to human resources employees or others at the various seminars and programs I alluded to at the outset of my remarks, I make it very clear that their actions may someday be the subject of second-guessing by juries consisting of individuals who are not schooled in managing employees or making

employment decisions but who, to the contrary, likely have been the subject of employment decisions made by others. Although I would not suggest to the Committee that juries are unable to make the kind of sophisticated assessments of situations often required at the end of a long and complex trial, I think it fair to say that they are more subject to courtroom manipulation that a single judge presiding over a case. Counsel trying important cases involving millions of dollars often employ specialists to assist them in selecting the right kind of jury. I do not believe that type of cynical manipulation of the system is warranted as we seek to remedy allegations of discrimination.

Moreover, a cardinal principle of Title VII will be lost. That is, the prompt resolution of employment disputes. Nothing is more certain to slow the process than the adding of an essentially limitless damages remedy and a jury trial. Congress may take notice that it is much harder to schedule a jury trial than a bench trial and much more expensive to the American public. What is less certain is whether the individual plaintiff will benefit in proportion to the increased time and expense.

Furthermore, adding compensatory and punitive damages subverts the original purpose of Title VII and the delicate balance crafted by the act's original drafters. As I suggested earlier, Title VII was designed to end discrimination and to make whole those persons victimized by unlawful conduct. Title VII was designed to help secure work, job advancement, and protection without prohibited discrimination. The remedies section empowered the courts to

require that a victim be hired, offered a promotion, given a raise. It even has been interpreted, where the employer's actions are particularly egregious, to permit the bumping of incumbent employees. Courts also have been given the right to provide victims back pay, so that if a plaintiff suffered a job-related economic loss, he or she would be given an amount sufficient to allow him or her to catch up.

In the seminal case *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Supreme Court held that once a court ruled that a plaintiff proved a Title VII violation, it was to award the individual such equitable relief, including back pay, as to make that person whole.

> Title VII deals with legal injuries of an economic character occasioned by racial or other antiminority discrimination. The terms "complete justice" and "necessary relief" have acquired a clear meaning in such circumstances. Where racial discrimination is concerned, "the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future. *Louisiana v. United States*, 380 U.S. 145, 154, [(1965)]. And where a legal injury is of an economic character, "[t]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed as near as may be, in the situation he would have occupied if the wrong had not been committed." *Wicker v. Hoppock*, 6 Wall. 94, 99 [(1867)].

Id. at 418-19. The Court reviewed not only the legislative history of the Congress that enacted Title VII but also the 1972 Congress

that, like the current Congress, considered making changes to the remedies provisions of the act. In 1972, Congress defeated efforts to cut back on the remedies allowed and also rejected an amendment to allow jury trials where a plaintiff sought back pay. Rather, according to the Court, Congress reenacted the backpay provisions without significant modification and underscored, in a Conference Committee Report, the importance of the act's make whole relief.

> "In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination."

Id. at 421, *quoting* 118 Cong. Rec. 7,168 (1972). As one U.S. district court cogently has noted: "Because an award of punitive damages requires a finding of bad intention on the part of the employer, punitive damages are inconsistent with the restitutionary 'make whole' purpose of Title VII." *Alexander v. Consolidated Freightways Co.*, 421 F. Supp. 450, 452 (1976); *accord Van Hoomissen v. Xerox*, 6 Fair Empl. Prac. Cas. (BNA) 1231, 1237 (N.D. Cal. 1973):

> After examining the lengthy legislative history of Title VII, in addition to the briefer history surrounding the 1972 amendments, this Court finds that Congress, when it drew up that part of the statute dealing with remedies for unlawful employment practices, had in mind a wide panorama of equitable tools that courts might use but did not intend that courts would punish

> defendants by imposing large money awards in the form of compensatory and punitive damages.

Title VII was not intended to offer a windfall to those fortunate enough to prevail in litigation. The act offered injury-specific relief--a job, promotion, or salary increase, for example, where one had been denied.

The Committee may be concerned that by failing to alter the remedy section of Title VII there may be plaintiffs who prove discrimination but may not be entitled to any relief. For example, under the *Price Waterhouse* formulation, there may be those who prove discrimination with direct evidence but who would not be entitled to relief where an employer proves a concurrent legitimate motive for its conduct. Under Title VII currently, this plaintiff may not be entitled to any recovery, having suffered no compensable loss. By amending the act to allow for recovery of compensatory and punitive damages, so the argument goes, the plaintiff would be entitled to monetary damages.

But relief consistent with the act is and would be available. For the act, in its present form, not only provides for equitable relief on behalf of those who suffer directly from discriminatory actions, but also gives the courts broad rights to fashion such injunctive relief to ensure that the unlawful conduct does not recur. Nothing prevents a court from exercising its discretion to issue an order barring the impermissible conduct.

In the rather notorious case decided by the federal circuit court in Washington, D.C., several years ago, *Bundy v. Jackson*, 641

F.2d 934 (D.C. Cir. 1981), a woman proved that she was the victim of sexual harassment. The district court found that making improper sexual advances to female employees was the standard operating procedure at the D.C. Department of Corrections. It refused to grant any relief to the plaintiff, however, because she was unable to prove tangible job loss as a result of her employer's conduct: she regularly received promotions and could not prove the denial of any job relating to her opposition to or displeasure with the harassment.

On appeal, the court ruled that the district court erred in failing to order at least injunctive relief, and it reversed. The D.C. Circuit also offered guidance to the trial court in framing its decree. In particular, the court stated that the injunction should require the director of the Department of Corrections to educate his employees on Title VII generally and on sexual harassment in particular. The employer also was to be directed to establish an internal mechanism for addressing harassment allegations. In sum, the focus of the court's direction was on making Title VII work, on ending discrimination by developing a remedy directed at the specific wrong.

Adding a compensatory and punitive damages remedy will change the focus of Title VII from seeking broadly to end discrimination in employment to seeking the most money from the deepest pocket.

Patterson

I last would like briefly to examine section 12 of S.2104, which would overrule the Supreme Court's decision in *Patterson*. In

Patterson, the Court held that Section 1981 was limited strictly to allegations involving the making or enforcing of contracts and did not support a cause of action for alleged racial harassment.

To overrule *Patterson*, S.2104 proposes adding a second subsection to Section 1981. Specifically, the new paragraph would define the right "to make and enforce contracts" to include, in addition to making contracts, matters pertaining to contract performance and termination "and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." Under the revised section 1981, a claim of racial harassment, which was one of the issues in *Patterson*, would be permitted to go to trial.

I respectfully submit that the question Congress ought to address is whether it should enlarge a provision of law that is inconsistent with the principal statute designed to end employment discrimination. That is to say, assuming that Title VII remains generally intact, enlarging Section 1981 thwarts Title VII's remedial nature for those alleging race discrimination. For under Section 1981, a plaintiff need not file a charge with the EEOC, need not conciliate, and need not act promptly. There is, in fact, significant disincentive to do any of these things given the availability for recovery of compensatory and punitive damages under Section 1981. In my experience, I have found it significantly more difficult to settle Section 1981 cases because plaintiffs' attorneys often hope to survive motions to dismiss and for summary judgment and get their cases in front of juries.

A number of commentators have suggested that Section 1981 is needed to extend the prohibition of employment discrimination to persons who may otherwise not be covered by any law. (As Congress is aware, this was not the case with the plaintiff in *Patterson*.) If it indeed is Congress's concern that the protections offered against discrimination under Title VII should be enlarged to encompass a greater percentage of the workforce, it would seem the appropriate amendment should be to section 701(b) of Title VII, which currently limits coverage to employers with fifteen or more employees. Conversely, if it is Congress's concern that Section 1981's prohibition against race discrimination is necessary to protect those employees that Title VII misses, perhaps an additional amendment to Section 1981 should define employer by noting a ceiling on the number of employees an employer may have and remain covered.

Finally, I would note that all but six states prohibit discrimination on bases similar to Title VII. Of the 44 states and the District of Columbia, ten use the fifteen employee threshold; thirty-two have established thresholds at eight or fewer. Only one state's limit exceeds that of Title VII. There is thus significant protection available to persons who may not fall within the federal act, Title VII, but who may obtain relief under state law.

Conclusion

At the Committee's request, I have limited my remarks to S.2104 sections 5, 8, and 12. Many of my comments concerning the effect that this bill would have on the balance originally crafted in 1964 and supported in 1972 would apply to other provisions of the bill.

For example, extending the statute of limitations from 180 or 300 days to two years is wholly inconsistent with the concept of prompt resolution of allegations of discrimination. Altering the disparate impact burden of proof, eliminating the plaintiff's obligation to identify employer practices challenged as unlawful, and permitting use of inspecific statistical evidence changes more dramatically Title VII than the *Ward's Cove* decision they were supposed to "correct."

I would hope that Congress would carefully consider whether Title VII truly requires amendment and if it does, whether a more surgical approach might maintain the balance that Title VII always has enjoyed.

PREPARED STATEMENT OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
ALTHEA T. L. SIMMONS, DIRECTOR, WASHINGTON BUREAU

Mr. Chairman and members of the Committee, I am Althea T. L. Simmons, Director of the Washington Bureau of the National Association for the Advancement of Colored People.

The NAACP, now in its 81st year, is adamantly opposed to any legislative, judicial or administrative attempts to wipe out the progress so painfully won literally through the blood, sweat and tears of our ancestors and/or the present generation.

The NAACP at its 80th Annual Convention in July, 1989 adopted the following resolution:

"EMERGENCY RESOLUTION
Recent Supreme Court Decisions

WHEREAS, black Americans have been systematically discriminated against since the founding of this nation; and,

WHEREAS, it appears that the majority of the U.S. Supreme Court is intent on destroying many of the hard-won civil rights gains of the past three decades; and,

WHEREAS, no amount of legal knowledge, theory, or reasoning can justify the Court's attacks on past decisions which gave civil rights litigants a fair opportunity to prove their claims and remedy long-festering wrongs; and,

WHEREAS, the decisions in Wards Cove Packing Co. v. Antonio, Richmond v. Croson, Lorance v. AT&T Technologies, Price Waterhouse v. Hopkins, Martin v. Wilks, Patterson v. McLean Credit Union and Jett v. Dallas Independent School District will have devastating effect on those seeking relief from employment discrimination and those who rely upon minority set-asides to ensure equal economic opportunity; and,

WHEREAS, women and minorities are losing ground with each successive Supreme Court ruling; and,

WHEREAS, there is a disturbing parallel between the actions of the present Supreme Court and those taken by an earlier Supreme Court during the Post-Reconstruction era.

NOW THEREFORE BE IT RESOLVED, that the NAACP in Convention assembled calls on Congress to act swiftly to restore the laws that have been adversely affected by the recent rulings of the Court on civil rights and affirmative action issues;

BE IT FURTHER RESOLVED, that we call upon members and citizenry to, on call, mount such powerful demonstrations that the group gathered in China not long ago will look like a few compared with the millions that we mobilize;

BE IT ALSO RESOLVED, that the NAACP vigorously oppose the intention of the present majority of the U.S. Supreme Court to retract and reduce the civil rights and liberties of minorities of women, and urge the Justices to reverse their present course and dedicate the Court to the establishment of equal opportunity and justice for all.

BE IT ALSO RESOLVED, that we call upon the President to act forth the details of his civil rights agenda and to give leadership to the fight for social and economic justice."

Mr. Chairman, the NAACP is struck by the parallels between the actions of the U.S. Supreme Court in 1989, some 127 years past-slavery and those of the Post-Reconstruction Court. You will recall that during Reconstruction seven (7) civil rights measures were passed by the Congress. The most far-reaching of these laws was passed in 1875 and dealt, in the main, with public accommodations. The Post-Reconstruction Supreme Court declared the 1875 law unconstitutional and the substance of that measure 89 years later became the Civil Rights Act of 1964.

Mr. Chairman and members of the Committee, it is ironic that the present Supreme Court saw fit to narrow its interpretation of Title VII of the Civil Rights Act of 1964 in the year 1989 - the 25th Anniversary of its passage.

Mr. Chairman and members of the Committee, the NAACP wholeheartedly supports the Civil Rights Act of 1990 and commends the chairman and sponsors of S. 2104 for their foresight in swiftly acting to remedy what we feel is the ill-conceived and/or mischievous action of the Court in turning back the clock on equality of opportunity for all Americans by narrowing the scope of section 1981 of Title 42 of the U.S. Code and undercutting Title VII of the Civil Rights Act of 1964.
Wards Cove, Patterson, Martin v. Wilks and other decisions did much to undermine and jeopardize the civil rights gains of the last two and one-half decades. The Court has sent a message

throughout the nation that has chilled the hopes and aspirations of minorities and women for a fair share of economic justice. Indeed, we must admit to a heavy feeling of deja vu.

We are aware that some of the groups testifying today will be doing so based on studies they have made of the impact of the various cases on their constituents. Thus, the NAACP will share with the committee its perception of the impact these decisions have had on black Americans.

On August 26, 1989 the NAACP sponsored a silent march of some 100,000 people in the nation's capital to protest the Supreme Court decisions.

The following analysis of the cases shows the devastation of these rulings:

PATTERSON v. McLEAN CREDIT UNION

In the Patterson case, the Court left standing, but eviscerated a section of the Civil Rights Act of 1866 that was one of the most powerful weapons of our civil rights lawyers. Section 1981's pertinent text reads, "(a)ll persons... shall have the same rights... to make and enforce contracts... as is enjoyed by white persons."

In Runyon v. McCrary, 427 U.S. 160 (1976), the Supreme Court

had expanded Section 1981's protection to include private contracts in addition to ones with governmental bodies and had allowed black parents to sue on behalf of their children, and force admission to segregated private schools. This law has been used to attack all sorts of discriminatory actions not specifically prohibited by other federal or state laws. Patterson sued her employer under Section 1981, alleging a pattern of racial harassment after she was hired and a discriminatory failure to promote.

Rather than ruling on the limited issue presented, the Court issued a sweeping ruling about the entire scope of the statute. The majority set forth a doctrine that sharply limits the instances in which this law granting minorities equal rights "to make and enforce contracts" can be the basis of a lawsuit. Instead of ruling that the "make and enforce contracts" phrase covers the entire gamut of contractual relations, as seems obvious, the Court broke the wording into two distinct parts. The words "to make contracts" now only prohibits discrimination in the actual formation of a contract and covers nothing about discriminatory "performance of an established contractual obligation" after the contract's creation. Similarly, the Court held that the "right to enforce contracts" phrase embraces only a right of legal process to enforce contracts.

IMPACT ON BLACKS

This ruling greatly limits the use of Section 1981. It

means, for example, that the black school child who could force her way into a segregated school with Section 1981 could not sue under this federal law if she was subjected to all types of racial harassment and discriminatory treatment in the school after her admission. The Court's ruling makes the victory she won a very hollow one. It also has a significant impact on possible damages because the statute allowed compensatory damages to the victim of discrimination far in excess of those allowed by laws like Title VII.

Mr. Chairman, Runyon was considered sacred by the civil rights community. The mere fact that this Court chose to reconsider it without being asked is a key that all past civil rights decisions are subject to future scrutiny.

MARTIN v. WILKS

Next in the string of assaults on civil rights was the case of Martin v. Wilks, which involved the Birmingham, Alabama Fire Department, which was all white until 1968. In 1981, the city entered into a consent decree settling litigation, filed in 1974 and 1975, with a class of black plaintiffs and the Justice Department. The litigation had challenged both hiring and promotion practices. The consent decree called for the city to make race conscious promotions as a means of eradicating the results of the "egregious" discrimination of the past, and specifically stated that it did not require the hiring or promotion of

non-qualified persons. Several months after the decree, a new suit was filed charging the city with "reverse discrimination." The trial court found this new suit to be an "impermissible collateral attack."

The Supreme Court struck down the collateral attack doctrine in situations like this and said the white firefighters should be allowed to proceed with their reverse discrimination lawsuit. The Court also ruled that the original parties to the suit, minority plaintiffs and defendant employers, would have to join, as additional parties to the suit, all white workers who might be adversely affected by the terms of the decrees. The fact that the white workers had knowledge of the lawsuit and had an opportunity to intervene did not prohibit a collateral attack.

IMPACT ON BLACKS

Dozen of similar decrees around the country are now subject to similar attacks as we face the prospect of seeing the minimal gains and limited redress achieved through the courts after years of denial jeopardized by these challenges. In addition, the burden of notifying and joining potential future litigants will fall primarily on plaintiffs as employers are not likely to willingly undertake this chore. This will make it more difficult and time-consuming for cases to be litigated with finality.

WARDS COVE v. ANTONIO

The most serious decision is Wards Cove for that ruling put the burden of proof on the victim of discrimination, no matter how stark the numerical disparity of the employer's workforce.

This case involved multi-faceted claims by salmon cannery workers in the Pacific Northwest concerning discrimination in hiring, job conditions and promotion into higher paying jobs at defendants' facilities. Employees of the canneries were segregated by race, with primarily whites holding the better, higher paying non-cannery jobs and Alaskan natives and Filipinos holding the lower paying laborer and cannery jobs. Recruitment was through separate channels. The higher paying jobs were not announced to the minority workers and most recruiting for whites took place by word of mouth.

Since the Supreme Court's decision eighteen years ago in Griggs v. Duke Power, 401 U.S. 474 (1971), most courts had agreed on certain discrimination cases. Disparate impact analysis was applied when an adverse impact was placed on a minority group protected by law.

After showing that the employer used a selection test or procedure that adversely affected minority workers, the burden of proof shifted to the employer to prove, by a preponderance of the evidence, that the use of that selection procedure furthered a

legitimate business interest. The burden of proof was completely changed by Wards Cove. Under that decision, all the employer has to do is to offer some proof that the selection procedure meets a business necessity and the burden then shifts to the minority employee to prove, by a preponderance of the evidence, that the selection device does not advance a legitimate business necessity.

IMPACT ON BLACKS

Griggs was the most important decision in employment discrimination history. It has been credited as a catalyst, causing more integration in the workforce than any other single decision. The loss of this catalyst is truly devastating. The change in the burden of proof will have a chilling effect on prospective litigants. These types of cases were difficult to prove and win before this decision. Now the likelihood of success is greatly diminished. The motivation for private attorneys to take employment discrimation cases on a contingency basis will be greatly diminished and many worthy claims can no longer be pursued simply because of the added cost of meeting this burden of proof through protracted discovery.

LORANCE v. AT&T TECHNOLOGIES

This decision is a ruling regarding when the time period for

filing a claim based upon a discriminatory seniority system with EEOC begins to run.

IMPACT ON BLACKS

The Lorance decision forces minorities to anticipate the potential adverse impact of employment. They must file charges with EEOC and begin litigation when they have not yet been injured by a policy change and may not have any reasonable basis for anticipating that they will be harmed. They are required "to sue anticipatorily or forever hold their peace." The Court has placed another hurdle before minority group members seeking to vindicate their rights to a workplace free of discrimination.

The intrinsic bias of the Court's reasoning is reflected in a comparison of the Lorance decision and the Wilks decision, which were issued on the same day. On the one hand, a white male can attack a decree at any time he decides he is adversely affected. On the other hand, minorities and women are faced with a strict time limitation which runs from the time of the underlying conduct without regard to whether they had any reasonable basis for anticipating any injury. The 5-4 majority seems obsessed with the idea that meaningful civil rights law might in some way infringe on the rights of some white male somewhere and, to prevent this hypothetical injustice, they are willing to throw years of moderately effective laws out the window, trampling on the rights, hopes and dreams of our nation's minorities.

The significance of the Civil Rights Act of 1990 cannot be overstressed. In our view, it is a monumental movement in the right direction as it restores the rights of minorities and women in the workplace. It addresses directly those decisions, Patterson, Martin v. Wilks, Wards Cove and others that weakened the protections against discrimination needed by all Americans.

We are disturbed by the shifting from the employer of the burden of proving the legitimacy/nonlegitimacy of a business practice that has an adverse impact on a minority group protected by the law, even though the information is best known to the employer. We feel a challenge not only to the cause and ideals of the NAACP, but to the ideals of all Americans.

As we read the Patterson decision, that refused to include on-the-job racial harassment within the prohibition of Section 1981, we feel a challenge to the basic ideal of our democracy that workers should be free of harassment on the job. I daresay that before the Patterson decision, most employees believed there existed, at least, an implied agreement between employer and worker against all types of harassment, including racial harassment, even though some employers may have elected to breach that contract.

As a result of the Court's effective evisceration of consent decrees entered into to end discrimination, we also feel a

challenge to this nation's ideal of equal opportunity. The stories were clear, the numbers were there to establish that something must be done to integrate our fire and police departments. Consent decrees are a part of the solution. Consent decrees are a part of the protection for victims of discrimination in hiring and promotions. Yet, somehow this cure for discrimination has been twisted into a possible cause of discrimination. The five Justices have opened the gate widely for challenges to court approved remedies to end discrimination.

The Civil Rights Act of 1990 will correct these problems; it restores what was and strengthens the protections and remedies available for victims. This legislation tells employers that where a discriminatory motive has been proven, the court may fashion the appropriate remedy under Title VII. The Civil Rights Act of 1990 refuses to make a mockery of one's ability to bring claims of discrimination before administrative agencies. It embraces realistic deadlines to allow victims to react to discrimination-- to allow the victims to become aware that they indeed have been discriminated against. The legislation upholds the broad construction of civil rights laws. It refuses to blame the victims of discrimination.

The NAACP fully embraces the Civil Rights Act of 1990 as a message of hope. We urge all members of Congress and all of America to join us in making America a better place. We are prepared to run the full course.

Mr. Chairman and members of the Committee, I thank you for this opportunity to be heard.

AMERICAN FEDERATION
OF LABOR AND CONGRESS
OF INDUSTRIAL ORGANIZATIONS

UNION YES

March 7, 1990

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President
Thomas R. Donahue
Secretary-Treasurer
Albert Shanker
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Richard L. Trumka

The Honorable Edward M. Kennedy, Chairman
Senate Labor and Human Resources Committee
Washington, D.C.

Dear Mr. Chairman:

The AFL-CIO commends you and your co-sponsors on the introduction of S. 2104, the Civil Rights Act of 1990. The Federation strongly supports prompt passage of this comprehensive legislation.

S. 2104 meets the urgent public need created by the recent misguided Supreme Court decisions which have undermined the protections against employment discrimination Congress wrote into statutory law. The courts have all but nullified both Title VII and §1981 in practical terms. The result is that the law no longer assures equal employment opportunity to women and minorities who have for so long been denied that basic measure of fairness.

This Nation cannot afford such a retreat on civil rights. As you and your co-sponsors of S. 2104 have recognized, Congress must act and act decisively to restore the employment discrimination laws to their full vigor. Prompt enactment of that bill should be a first priority in this session. We look forward to working with you toward that end.

Sincerely,

Robert M. McGlotten

Robert M. McGlotten, Director
DEPARTMENT OF LEGISLATION

cc: All Members Senate Labor and
Human Resources Committee

815 SIXTEENTH STREET NW
WASHINGTON D C 20006
202 637 5000

Minnesota Department of Human Rights

February 27, 1990

The Honorable Edward M. Kennedy
United States Senate
Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Kennedy:

I am aware that your committee currently has before it civil rights legislation which would provide plaintiffs, or complaining parties, with the opportunity to seek monetary relief beyond back wages now allowed under Title VII of the Civil Rights Act of 1964. Because the Minnesota Human Rights Act allows for the award of several types of remedies beyond back wages, I wanted you to know our perspective on the effect strengthening such statutory provisions appears to have on administrative settlements, both pre- and post-determination, of discrimination charges.

The Minnesota Human Rights Act was amended in August, 1980 to allow persons aggrieved by a violation of the Act to seek compensatory damages (e.g., back wages) and punitive damages not to exceed $1,000. Charges closed during our 1981 fiscal year (i.e., July 1, 1980, through June 30, 1981) primarily arose from actions jurisdictional to the Act as amended in August, 1980 or earlier, weaker provisions for relief. During fiscal 1981, 6% of the Department's closures were by way of pre-determination settlements, and 2% of the closures resulted from conciliation agreements following findings of probable cause, but prior to litigation.

During the fiscal year 1989, the vast majority of cases closed by the Department were jurisdictional to more recent amendments which provide for up to triple actual damages (e.g., back wages), punitive damages up to $8,500, compensation for mental anguish, pain and suffering (no cap), reasonable attorney's fees and a civil penalty (no cap) payable to the state. Our closures for 1989 included 12% pre-determination settlements and 9% conciliation agreements.

These figures strongly suggest that increased potential for award of damages is an incentive to achieving a negotiated settlement of administrative charges of discrimination. It is also the Department's experience that increased potential relief, as well as substantial court awards, has greatly increased the opportunities for plaintiffs to interest attorneys in taking their cases on a contingency fee basis. Such private litigation reduces the demand on the Department's limited budget for pursuing complaints at public expense.

I appreciate having had this opportunity to relate our agency's experience as Minnesota's civil rights protections were strengthened during the 1980's. I would encourage your committee to look favorably upon federal legislation which would provide appropriate relief for victims of discrimination, without diminishing the EEOC's ability to successfully resolve charges through negotiation. Minnesota's experience shows no loss of effectiveness in this area; in fact, it strongly indicates parties to a charge have an increased incentive to arrive at a negotiated settlement.

Sincerely,

Steven R. Lapinsky, Director
Enforcement Division
(612) 296-5223

/mw
cc: Stephen W. Cooper
Commissioner

PREPARED STATEMENT OF THE PLAINTIFF EMPLOYMENT LAWYERS ASSOCIATION
ROBERT B. FITZPATRICK, VICE PRESIDENT

I am the Vice-President for Governmental Affairs of the Plaintiff Employment Lawyers Association (known as PELA).[1] PELA is a non-profit organization consisting of nearly Eight Hundred and Thirty-Five (835) lawyers in forty-eight (48) states who generally represent individual working people in connection with their employment. Most often the members of our organization represent non-union employees in cases involving wrongful or discriminatory termination in violation of state or federal law.

PELA members have been in the forefront of representing victims of discrimination for many years. As a group, we have collectively handled thousands of cases involving the principle of equal employment opportunity which Congress made a national priority through enactment of Title VII of the 1964 Civil Rights Act. I would like to share with you some of the daily realities which have been faced by PELA members in their efforts to obtain relief for the victims of discrimination in our courts. In particular, I would like to explain why we believe that the enactment of the Civil Rights Act of 1990 is essential if the bi-partisan commitment to remedy and eradicate discrimination begun in 1964 is to continue.

The members of PELA have personally observed in their daily work the impact of the recent Supreme Court decisions which are addressed by this proposed legislation. The effects of the

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[1] I wish to thank Frederick M. Gittes, PELA's Ohio chairperson, for his work in drafting this statement. Mr. Gittes is a partner in the law firm of Spater, Gittes, Schulte & Kolman in Columbus, Ohio, and has extensive experience in representing discrimination victims throughout the country.

recent decisions have turned the civil rights clock back almost two decades and jeopardize many of the gains which have been obtained in recent years for minorities and women. As one who has personally handled many civil rights cases, I can tell you that these recent decisions are making equal opportunity unattainable for minorities and women for two reasons. First, the decisions make it far more difficult for the victims of discrimination to secure any relief in our courts. Second, the decisions will make worse the already significant obstacles to finding counsel who will handle civil rights cases.

The Civil Rights Act of 1990 will rectify the unwarranted consequences of the recent Supreme Court decisions without jeopardizing the investigative and conciliation processes of federal or state civil rights commissions and without placing any new or unreasonable burdens on employers. I would like to review some of the more significant sections of the legislation in relation to some of the questions which have been raised by employers' organizations opposing certain aspects of the bill.

THE BILL PROVIDES MEANINGFUL PROTECTION TO MINORITIES AND WOMEN FROM HARASSMENT ON THE JOB

Section 12 of the bill eliminates the disastrous consequences of the Supreme Court's decision in Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1989), in which the Supreme Court held that Title 42 U.S.C. §1981 (barring intentional race discrimination regarding the making and enforcement of contracts) does not prohibit even the most extreme forms of racial harassment and discrimination on the job. In Patterson, the Supreme Court

determined that this 1866 statute which has been widely used in the modern era to protect racial minorities from on-the-job discrimination and harassment only applies to the making of contracts (or the initial obtaining of employment) and offers no protection from harassment or discrimination to an employee after hire. Since the Patterson decision, §1981 claims pending in our courts have been dismissed at a rate of almost one (1) every day.

In the private market, absent §1981, employers may visit upon racial minorities in their work force racial harassment without any meaningful federal remedy being available for the employees. African-American employees, for example, have often suffered from hostile racial atmospheres at their workplaces resulting from daily exposure to racist "jokes", racial intimidation, racial graffiti and racist epithets to the point in many cases of experiencing fear for personal safety, anxiety about job security and even physical illness.[2] However, in some cases no demotions or terminations involving loss of earnings occur. Section 1981 offered the only means for such employees to obtain a meaningful remedy for the humiliation and degradation suffered on

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[2] For example, Terrill McGinnis, an African-American male and sole black employee with an Alabama company, in the words of the trial judge, "suffered many more racial indignities at the hands of the Company than any one citizen should be called upon to bear in a lifetime". McGinnis v. Ingram Equipment Company, Inc., 685 F. Supp. 224, 228 (N.D. Ala. 1988), vacated and remanded, 888 F.2d 109 (11th Cir. 1989). See also, Taylor v. Jones, 653 F.2d 1193, 1198 (8th Cir. 1981) (noose displayed in the workplace to intimidate and harass Black employees); Hunter v. Allis-Chalmers Corp., 797 F.2d 1417 (7th Cir. 1986) (racial slurs and epithets spoken without restraint in the workplace); and Clairborne v. Illinois Central R.R., 83 F.2d 143 (5th Cir. 1978), cert. denied, 442 U.S. 934 (1979) (stricter supervision of employees based on their race).

a daily basis at the workplace. Where a pattern of such intentional discrimination had been proven in the past, employers would be subject to awards of compensatory and, in the most flagrant instances, punitive damages. Now, as a result of Patterson, no such remedy is available. Title VII of the 1964 Civil Rights Act does not permit punitive nor compensatory damages (a shortcoming which would be remedied by this bill). Where an employee does not actually lose wages or suffer a loss of position, Title VII offers little meaningful relief.

The bill in Section 12 restores a common sense interpretation to §1981. Under the bill, racial minorities would not only be protected in obtaining employment, but be able to obtain relief from harassment and discrimination after they are employed.

Another important feature of the bill is that it would provide the same remedy to women and other minorities not covered by §1981. Section 8 of the bill would permit compensatory damages and, in cases of malicious conduct (as defined by the Supreme Court in Smith v. Wade, 461 U.S. 30 (1983)), punitive damages under the Civil Rights Act of 1964. The logic and necessity for this step are unassailable. It is most apparent in connection with the sexual harassment suffered by working women at an alarming rate in this country. In 1980 the Merit Systems Protection Board released a study indicating that 43% of working women experience sexual harassment during their working lives. Much of this harassment can take forms which are emotionally devastating and, yet, not

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necessarily involve any loss of wages. Working women are frequently subjected to sexual solicitation, obscene remarks and gestures, and demeaning treatment by supervisors. There are numerous instances of this type of conduct (and worse) suffered by working women reported in judicial opinions in recent cases.[3]

Yet, under Title VII there is really no meaningful relief for these women who in many cases have suffered severely because of a daily, constant barrage of sexual harassment in many forms. Especially in states which have not recognized torts based on infliction of emotional distress there is no serious consequence to an employer that engages in or tolerates this conduct. Nothing could be more appropriate than affording women and others the same protection which had been available for years through §1981 to certain racial minorities. More important, nothing, in the long run, will bring an end to this type of conduct sooner than requiring those employers who choose to allow such conduct to answer in damages.

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[3] See, Hall v. Gus Construction Co., Inc., 842 F.2d 1010, 1012 (8th Cir. 1988) (three women, after accepting employment with a construction company, were immediately subjected to sexual harassment at work, including touching of their thighs and breasts, and being sexually propositioned); Brooms v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989) (plaintiff endured "numerous explicit racial and sexual remarks" throughout her employment, as well as her supervisor's sexual advances); and Meritor Savings Bank, FAB v. Vinson, ___U.S.___, 106 S.Ct. 2399 (1986) (female bank employee was subjected to repeated sexual demands, fondled in front of other bank employees, and forcibly raped by her supervisor).

THE BILL ENDS DISCRIMINATION AGAINST
CIVIL RIGHTS CLAIMS AS TO THE TIME ALLOWED TO FILE

The Patterson decision also highlighted another inconsistency in our civil rights laws which is alleviated by the bill. Section 1981 not only allows for compensatory and punitive damages for discriminating against racial minorities where none are available under Title VII, but the section also has a longer time limit for filing claims. Depending on the jurisdiction in which the case arose, the time for filing a §1981 action could range from one to six years.[4] In sharp contrast, women and other victims of discrimination who are not covered by §1981 have only three hundred (300) days to file a charge of discrimination with the Equal Employment Opportunity Commission if they live in a state in which there is a state agency enforcing civil rights laws. In states without such an agency, they have only one hundred eighty (180) days.

Under the bill, victims of discrimination will all have two (2) years to file under Title VII after the last act of discrimination has occurred or has been applied to affect adversely the person aggrieved, whichever is later.

I am aware that both the two (2) year limit and the inclusion of compensatory and punitive damages has been questioned

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[4] See, Wilson v. Garcia, 471 U.S. 261 (1985); Goodman v. Lukens Steel Co., 107 S.Ct. 2617 (1987); Demery v. City of Youngstown, 818 F.2d 1257 (6th Cir. 1987) (applying one-year statute of limitations); and Larkin v. Pullman-Standard Div., Pullman, Inc., 854 F.2d 1549 (11th Cir. 1988) (applying six-year statute of limitations).

before the Congressional Committees hearing this legislation by the bill critics. I would like to address those criticisms.

I am at a loss to understand the concerns expressed by critics of this bill regarding extending the time limit for filing charges under Title VII to two years. In most jurisdictions, claims arising from wrongful discharge not involving discrimination permit the filing of claims well beyond 180 days. In most jurisdictions in this country, in fact, most lawsuits (most not involving matters of as much public importance as the right to remedy discrimination) may be filed from 3 to 15 years after the termination for breach of contract. Cases involving invasion of privacy in many jurisdictions may be pursued four or more years after the events causing complaint. Cases involving defamation typically have statutes of limitations of one year or more. Even the ordinary automobile accident case generally involves statutes of limitations of two or more years in most states.

How can we justify, in light of the importance to a democratic society of deterring discrimination, requiring the victims to pursue their complaints in only 180 days or even 300 days? Considering the difficulty of locating attorneys (discussed below) who will handle civil rights cases and the difficulty in gathering evidence to prove discrimination, such an arbitrarily short time period is a deterrence to civil rights victims. Certainly, the victim of intentional discrimination should have as long as the victim of an automobile accident to pursue their claims, either through a Commission or the courts.

IN STATES ALLOWING COURT AWARDS OF DAMAGES IN DISCRIMINATION CASES, THE WORK OF STATE CIVIL RIGHTS COMMISSIONS HAS NOT BEEN AFFECTED

Those who assert that expanding the remedies under Title VII of the 1964 Civil Rights Act will endanger the role of federal and state commissions have simply not looked at the facts. Adding provisions for compensatory and punitive damages will not jeopardize the investigative and conciliation work of state or federal commissions. If anything, the availability of compensatory and punitive damages, which is entirely appropriate in cases involving intentional discrimination (the bill permits damages only if intentional discrimination is proven), will enhance the ability of commissions to effectively obtain appropriate resolutions of discrimination claims.

A number of states which have civil rights commissions allow victims of discrimination to go to court for injunctions and damages without seeking commission involvement. The experience of these states teaches that the availability of court remedies, including damages, has not reduced the role of civil rights commissions in the investigation and conciliation of discrimination cases.

In 1979, the Ohio Legislature amended R.C. §§4101.17 and 4112.02(N) to provide court actions related to age discrimination. Under §4112.02(N), all forms of relief are available, including damages. These statutory amendments effectively overruled the Ohio Supreme Court's decision in Fawcett v. G.C. Murphy & Co. (1976), 46 Ohio St.2d 245, 348 N.E.2d 144, in which the state's Supreme Court

ruled that the exclusive remedy for age discrimination was through the Ohio Civil Rights Commission and no private court actions were permitted by the then existing statutes. Under the amendments adopted in 1979, which established the current language regarding civil actions for age discrimination under Ohio law, a victim of age discrimination may file directly in court or with the commission. However, the statutes, as amended, require an election. A discrimination victim cannot file in both places.

If the critics of the Civil Rights Act of 1990 were correct that the availability of court remedies including damages will cause commissions to be ignored to the detriment of conciliation efforts, the data related to age discrimination charges before the Ohio Civil Rights Commission should have shown a dwindling number of charges in the years following 1979. The statistics contained in the annual reports of the Ohio Commission demonstrate just the opposite. In every year from 1979 to 1987, the number of age discrimination charges received by the Commission has increased. In fact, between 1980 and 1987 there was a three hundred thirteen percent (313%) increase![5]

This has also been the experience in other states regarding all forms of discrimination claims. In Michigan, for example, the state law has permitted victims of discrimination for many years to file actions directly in state court for injunctions,

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[5] In 1987 the Ohio Legislature further amended the state's civil rights laws subjecting any violators of any of the State's anti-discrimination laws to "a civil action for damages, injunctive relief, or any other appropriate relief." See, O.R.C., §4112.99.

damages and attorneys fees without exhausting the administrative remedies available through the state's civil rights commission. This has been true in Minnesota as well. As with the Ohio experience, the availability of a court action for damages has not diminished the role of the corresponding commissions in these states in investigating, conciliating and prosecuting civil rights violations. A review of the annual reports of the Michigan Civil Rights Commission and the Minnesota Department of Human Rights for the last decade reveals that charges filed with these commissions have not experienced any declines, and, in fact, have remained at a steady level over the years despite the availability of court relief under Michigan's and Minnesota's civil rights statutes.[6]

Other states have recognized that there is no detriment to the operations of their state's civil rights commission in allowing victims of intentional discrimination judicial remedies including damages. The State of Tennessee recently enacted legislation permitting discrimination victims to go to court for relief without waiting for or depending upon commission proceedings. See, Tennessee Code Annotated §4-21-331.

The experience of state commissions is similar to that of the United States Equal Employment Opportunity Commission. Under Title VII victims of discrimination may file with the EEOC and then file in federal court, regardless of whether the EEOC has completed

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[6] The number of employment discrimination charges filed with the respective commissions in these two states has increased over the past decade. In Minnesota, these charges have increased from 1,117 in 1980 to 1,603 in 1989. In Michigan, these charges have increased from 5,419 in 1979 to 5,721 in 1988.

its investigation or conciliation efforts.[7] As has already been mentioned, for years now, victims of racial discrimination have also had the ability to avoid the EEOC entirely by pursuing remedies under Title 42, U.S.C. §1981.

The EEOC has issued a statistical summary of charges filed in administrative proceedings before the Commission for the period 1980 through 1988. This statistical summary demonstrates that the availability of court remedies (including damages through §1981) has not minimized the EEOC's ability to effectuate settlements and conciliations or to determine whether probable cause existed. For example, in 1988 the EEOC retained jurisdiction over cases long enough either to attempt conciliation or to determine the absence of probable cause in 64.7% of the cases closed in that year. In 1988 only 24,960 cases were administratively closed, while over 45,789 cases were subject to conciliation efforts or dismissed for lack of probable cause. This pattern appears to have been the case in all of the years between 1980 and 1988.

If the claims of critics of the Civil Rights Act of 1990 were accurate, one would expect the EEOC would have been forced to administratively close most cases before being able to complete a probable cause determination and conciliation. This would be the

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[7] While there is a statutory requirement of 180-day waiting period for conciliation by the EEOC, the EEOC, by regulation, has specifically allowed for issuance of right-to-sue letters without the 180-day waiting requirement. See, 29 C.F.R. §1601.28(a)(2). Because of the EEOC's backlog, requests for immediate issuance of Right-to-Sue letters are routinely granted.

case since discrimination victims who want to avoid administrative procedures (and who, theoretically, are being urged by "greedy" attorneys to go to court) may simply obtain a right-to-sue letter within weeks after filing their charges. More important, charges need not be filed at all in race discrimination cases since §1981 would be available in many instances for relief. Yet, the statistics of the Commission demonstrate this is not happening to any significant degree.

One of the fundamental principles of the 1964 Civil Rights Act was the need for private enforcement of the rights protected by the civil rights laws. As noted by the Court in Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968):

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law.

The simple reality is that our commissions (both federal and state) are not sufficiently funded and staffed to handle the wide-spread problem of discrimination affecting so many aspects of American life. While there has been progress in recent decades, no one seriously suggests discrimination is no longer a serious problem in our nation.

Anyone who takes the time to review the annual reports of many of our state commissions will quickly recognize the truth of this fact. Indeed, the Ohio Civil Rights Commission maintains statistics on its backlog. I do not mean to single out Ohio's Commission. It is typical of commissions throughout the country.

The backlog as of the last commission report available to me was over three thousand (3,000) cases.

Contrary to the suggestions of many critics, there are relatively few attorneys who are willing to take civil rights cases, which is part of the reason that our commissions are overburdened despite the desire for private enforcement. Many courts have recognized the unavailability of civil rights attorneys. As one district judge noted in an Alabama case:

> ...attorneys in the state are unwilling to undertake employment discrimination cases on a contingency basis because, in large part, they believe the cases are uneconomical; the fees they receive when successful are not high enough to justify taking the risk of losing such cases, especially since there is plenty of other more stable and profitable work available. In fact, a substantial percentage of the lawyers that handled contingency fee employment discrimination cases in the past have stopped doing so for this reason; moreover, the evidence shows that very few, if any, young lawyers in the state are going into the practice of civil rights and employment discrimination law because it is so uneconomical. As a result, there is a severe and critical shortage of lawyers regularly willing to handle employment discrimination cases on a contingency basis in this state; and those who are alleged victims of employment discrimination but who cannot afford to pay the costs and fees of litigation are, therefore, finding it increasingly more difficult to find counsel.

Stokes v. City of Montgomery, Ala., 706 F. Supp. 811, 817 (M.D. Ala. 1988).[8]

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[8] Also see, Clark v. City of Los Angeles, 803 F.2d 987 (9th Cir. 1986) (the court noted a shortage of lawyers willing to take civil rights cases and that the plaintiffs' case was rejected by at least 10 attorneys before representation could be obtained); Norwood v. Charlotte Memorial Hospital and Medical Center, 720 F.

The next time that you are referred to a substantial fee award in a civil rights case, consider the time and costs involved. A good example of this experience can be found in the case of Missouri v. Jenkins by Agyei, 109 S.Ct. 2463 (1989). A sole practitioner undertook this desegregation case which almost resulted in his bankruptcy. During the years of litigation of this case, often involving substantially all of the time of the attorney involved, he was unable to generate income because he was so consumed by the demands of the desegregation case. The hardships on this attorney were such that even the United States Supreme Court commented upon it in ruling upon an appeal of the fee awarded in the case. There are numerous other examples. Mr. Gittes' firm in Ohio handled a class action for black police officers in the City of Columbus, and faced similar hardships and near financial disaster. For substantial periods during the ten years liability was litigated, the senior partners of the firm could do no other work. During all that time, no compensation was received and many expenses had to be met in connection with the litigation. In the end, the court found "overwhelming" evidence of discrimination permeating virtually every aspect of the police department involved. P.O.E.R. v. City of Columbus, 644 F. Supp. 393 (S.D. Ohio 1985). The $900,000 in fees eventually awarded the firm

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Supp. 543 (W.D. N.C. 1989) (the court stating "while there were only a few attorneys willing to take on employment discrimination cases on a contingency...there were always lawyers available...to defend employment cases", Id., at 656); Moore v. Story, 694 F. Supp. 1557 (S.D. Fla. 1988); and Jones v. Federal Department Stores, 527 F. Supp. 912 (S.D. Ohio 1981).

amounted to annual salaries (over the 10 years of the case) for the three attorneys involved, comparable to those paid young public defenders or prosecutors and hardly compared to the income of experienced lawyers in other types of litigation.

I do not mention these facts to elicit any special sympathy for attorneys. I mention these facts to stress that the victims of discrimination will suffer if the recent decisions of the Supreme Court are not modified because they make it even more unlikely that competent counsel will be available to undertake these cases.

DAMAGES FOR WRONGFUL DISCHARGES HAVE GENERATED RELATIVELY FEW TRIALS AND ARE A COST EFFECTIVE DETERRENT TO ILLEGAL CONDUCT

I am also aware that critics of this bill, particularly the sections dealing with the availability of compensatory and punitive damages, have suggested such provisions will result in frequent and unreasonable jury awards against employers. In fact, the Senate was referred to one study of decisions in California which reported that the average jury verdict in successful wrongful termination cases in that state was $650,000.00. Once again, consideration of the actual facts surrounding wrongful termination cases sheds a very different light on these concerns.

The Rand Corporation's Institute for Civil Justice studied wrongful termination cases in California over a 6 year period. Critics of the bill have pointed out that the Rand study reported that employees won 68% of the cases which went to trial. (It must be emphasized that during the 6 year period of the

California study only 120 cases went to trial). What critics of the bill failed to point out is that this is no different than typical litigation involving contracts and other business disputes. As the Rand study pointed out, plaintiffs in contract/business disputes which went to trial have 69% and 66% plaintiff-win rates, respectively.

As to the jury awards, the Rand study emphasized that the average jury verdict was skewed because of several multi-million dollar cases which were unusual. The median jury award in these wrongful termination cases was actually $177,000.00. The study also noted that there has been no increase in the average amount of jury awards for years when inflation is taken into consideration. Other studies have reached similar conclusions and also noted that, per capita the number of million dollar awards has not increased in the last decade.

The critics of compensatory and punitive damages frequently fail to note the factual circumstances in which juries have made substantial awards in these matters. In most of the cases, employees who had served dutifully and productively for ten to twenty years were terminated without warning or basis. As the Rand study demonstrated, it typically takes three to five years before the cases were tried. Many of the terminations also involved defamations (and in some cases, false arrests initiated by the employer), all of which prevented the wrongfully terminated

employee from gaining any other employment.[9] As a result, these long-term workers (many in their late 40's and early 50's with families to support) not only lost a job but were left without any income for years.[10] Having exhausted unemployment benefits, once productive heads of households have been forced to rely on welfare or other handouts, all the while suffering the stigma of false accusations and statements made by employers -- in some cases, motivated by prejudice. When such employees lost middle management positions with yearly earnings in the $50,000 range, in a period of four to five years lost salary alone (exclusive of other benefits) will amount to $200-300,000.00.

It is important to stress that the injury in cases of discrimination, particularly where productive, talented people are denied a job, is not just to the individual victims. Society suffers as a whole. This is the underlying premise of all the

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[9] One of the largest wrongful discharge awards in history is the jury award in Sims v. Kaneb Services, Inc., Harris County, Texas, District Court No. 86-2474. In this case, the employer not only fired its long-time accountant with an excellent work record for refusing to go along with a fraudulent tax scheme, but then filed false criminal charges and a complaint with the accounting board in an effort to strip him of his accounting license. The employer's chief of corporate security testified that the criminal and accounting board charges were fabricated in an attempt to ruin the plaintiff and make it impossible for him to pursue his wrongful discharge claim.

[10] The Rand study noted a relationship between the amount of jury awards and the age of the employees. Employees in their early 50's were significantly more likely to be awarded greater damages. Such larger awards are consistent with the years of service and the prospects of subsequent employment of employees who were wrongfully discharged at such a critical juncture in their lives. In addition, the studies indicated that the size of the employer was a factor for juries. Juries made a distinction in their awards between middle or large firms versus small firms.

civil rights laws in our nation. We all suffer when talented women and minorities are excluded from our economic enterprises. The question for Congress is what are the societal costs of protecting individuals from discrimination, including wrongful discharges, compared to the loss to society caused by the intentional exclusion of women and minorities because of their sex, the color of their skin, their religion or their age. In these regards the conclusions of the Rand study are enlightening. The study noted, "Despite the uproar over wrongful termination litigation, the aggregate legal costs are really not very large." The Rand study pointed out that even in those jurisdictions with the most liberal laws pertaining to the right of employees to sue for discharge, annual trials add up to only 8.8 trials per million workers. The study concluded that the annual cost of jury trials comes to $2.56 per worker. The study also reported, "These aggregate costs are not very large even in comparison with the number of involuntarily terminated employees who were not otherwise protected by collective bargaining agreements, civil service regulations, or explicit employment contracts." According to the study, "the average legal cost associated with the discharge of an at-will employee is about $200.00."

One commentator recently noted that some 60 million U.S. employees are subject to the employment-at-will doctrine in this country, which permits the discharge of employees for no reason or any reason at all. According to the Bureau of Labor Standards, three million employees are discharged for "cause" each year by

private-sector employers in this country. About 2 million of those discharged employees are terminated without the right to a hearing by an external, impartial tribunal. The same commentator estimates that about 150,000 of these 2 million have been discharged without just cause and would have been reinstated to their former jobs if they had a right to appeal. See, Stieber, "Recent Developments in Employment-At-Will", Labor Law Journal, 557 (August, 1985).

Considering the magnitude of terminations in this country, it is extraordinary how few cases involving wrongful discharges, including discrimination claims, actually come to trial. In a nationwide study done for the Bureau of National Affairs, the employer defense firm of Schmeltzer, Aptaker & Sheppard found that in the period from January 1, 1986 through June 30, 1988 there were a total of 260 jury verdicts in wrongful termination actions nationwide (including state and federal courts).

These studies indicate that in jurisdictions where a full range of remedies for wrongful terminations have been permitted, there has been no evidence of serious or unwarranted abuse of the jury trial system to the detriment of employers. Employers certainly have been found guilty of misconduct and been required to pay substantial damages. In almost every case, however, the awards have been justified by the actual economic loss to the employee involved and by the intentional and wanton conduct of the employer.

UNLESS WARDS COVE IS REVERSED, EMPLOYERS MAY USE WITH IMPUNITY BUSINESS PRACTICES WITH ADVERSE IMPACT

Perhaps the single most important feature of the Civil Rights Act of 1990 is that the bill (Sections 4 and 5) overrules the Supreme Court's recent decision in Wards Cove Packing Co. Inc. v. Atonio, 109 S.Ct. 2115 (1989). In Wards Cove, the Supreme Court, in one stroke, summarily rejected 18 years of civil rights jurisprudence and the decision of the Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971). Others have addressed the importance of the unanimous decision of the Supreme Court in Griggs written by Chief Justice Warren Burger. The committees hearing this bill have heard eloquent testimony from former chairpersons of the United States Equal Employment Opportunity Commission as well as counsel who have defended companies in discrimination cases (and advise these companies regarding their personnel practices) regarding the importance of rejecting Wards Cove.

From whatever perspective one approaches the Griggs case, it stands as the single most important decision for equal opportunity in employment since the enactment of the 1964 Civil Rights Act. Griggs was to equal employment opportunity what Brown v. Board of Education, 347 U.S. 483 (1954) was to equal educational opportunity in America.

I will not repeat here the extensive testimony of such distinguished commentators as Nicholas Katzenbach, William H. Brown, L. Stanley Chauvin, Jr. (for the ABA) and State Attorney Generals Robert Abrams and Robert Spire. I do, however, want to address certain remarks of critics of the bill before the Senate

and House committees. In particular, I want to emphasize the following points: (1) Wards Cove did change the law of disparate impact cases; (2) the bill will not place an onerous or new burden on employers; (3) the provisions of the bill regarding Wards Cove will not impact significantly on small employers; (4) the bill will not require employers to use quotas to avoid liability and; (5) Wards Cove, if left unchanged, will mean that employers may use discriminatory selection and/or promotion systems and avoid any liability by simply refusing to keep required records.

In Wards Cove the Supreme Court by a one vote majority decided that employers who used employment practices or selection devices that had a significant adverse impact on women or minorities (or other protected classes) did not have to prove that the business practice or selection device was a business necessity as that term had been defined in years of prior case precedent. Instead, under the new formulation of Wards Cove, an employer need only produce some evidence (it is not clear how much) that the discriminatory business practice or selection device serves some legitimate employer goal.

The practical effect of the Wards Cove decision will be to make the already dwindling number of attorneys willing to handle disparate impact cases disappear. Contrary to the suggestions of some witnesses before the Congressional committees hearing this legislation, there can be no serious question that Wards Cove did change the law. As I have mentioned, the members of PELA have handled thousands of discrimination cases, and over the years,

hundreds of disparate impact cases. I can tell you that as a matter of every day practice there was no question prior to Wards Cove that Griggs v. Duke Power Co. was applied to place a burden of proof on defendants.[11] Such a burden makes common sense.

Employers are the ones who develop specific practices and selection devices. They are in control of all the information and data relating to the development and application of such practices and devices. In fact, requiring employers to demonstrate the necessity of these business practices has been to the benefit of employers. As was noted by a number of the witnesses (including business representatives) who testified before the Senate and the House, employee testing and selection procedures have improved dramatically as a result of the Griggs decision. By requiring employers to have selection practices which were necessary for business operations, the employers developed testing devices which picked employees based on criteria related to successful performance of the job, instead of unrelated or unimportant criteria. Better employee selection has resulted.

If members of the Senate and the House review all of the testimony submitted critical of those portions of the bill reversing the Wards Cove decision, they will fail to find a single example of a case decided before Wards Cove not involving a highly

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[11] See, Williams v. Colorado Springs Colo. Sch. Dist., 641 F.2d 835 (10th Cir. 1981); Kirby v. Colony Furniture Co. Inc., 613 F.2d 699 (8th Cir. 1980); Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157 (5th Cir. 1978); Walker v. Jefferson County Home, 726 F.2d 1554 (11th Cir. 1984); and Grant v. Bethlehem Steel Corp., 635 F.2d 1007 (2d Cir. 1980).

questionable selection or testing device. In case after case, the principles of Griggs were used to strike screening or testing devices which were not manifestly related to the jobs involved and were excluding minorities or women.

Nor is it true as claimed by critics of this bill that employers can never meet the burden imposed by the bill. Business necessity as defined in this bill has been the standard for many years. There are numerous Court of Appeals cases applying Griggs which make that clear.[12] Indeed, when Congress enacted the 1972 amendments to the 1964 Civil Rights Act, Griggs was cited with approval in the committee reports, and the House Report (1972 U.S. Code Cong. & Admin. News, 2137, 2157) specifically noted that the burden was upon employers to show the "overriding business necessity" of any facially neutral employment practice or policy which disparately impacted upon minorities or women or other protected groups.

In many cases prior to Wards Cove, applying Griggs principles, employers have demonstrated through job validation studies or other evidence that their employment practices, although adversely impacting upon women or minorities, were necessary and

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[12] See cases cited in previous footnote. See also, Dothard v. Rawlinson, 443 U.S. 321 (1977); Parsons v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374 (5th Cir. 1978); Robinson v. Lorilland, 444 F.2d 791 (4th Cir. 1971); and Hawkins v. Bounds, 752 F.2d 500 (10th Cir. 1985).

therefore not in violation of the civil rights laws.[13] The same defenses would be available to employers under the bill.

The bill is also not a threat to small employers. Title VII does not apply to employers who have fewer than 15 employees. While §1981 reaches all employers regardless of their size, the Supreme Court has ruled that §1981 addresses only intentional discrimination and does not encompass Griggs-type cases. General Bldg. Contractors Assoc. v. Penala, 458 U.S. 374 (1982). The bill would not change that restriction.

Even before Wards Cove due to the expense and judicial limitations on class actions, the number of class actions involving employment discrimination have dwindled over the last decade. According to the administrator of the U.S. Office of Courts, the number of class action civil rights cases involving employment commenced in 1977 were 1,138. In 1987, only 48 such cases were commenced. In 1988, only 46 such cases were commenced.

A further limiting factor protecting smaller employers from being affected by disparate impact cases is the role of statistics. The Supreme Court has made it clear that a mere difference in the selection or promotion rates of minorities or women compared to those of non-minorities or men does not create a disparate impact case. The differences must be significant based

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[13] Roby v. St. Louis Southwestern Ry. Co., 775 F.2d 959 (8th Cir. 1985); Levin v. Delta Air Lines, Inc., 730 F.2d 994 (5th Cir. 1984); Black Law Enf. Officers Ass'n. v. City of Akron, 824 F.2d 475 (6th Cir. 1987); Clady v. County of Los Angeles, 770 F.2d 1421 (9th Cir. 1985), cert. denied, 475 U.S. 1109 (1986); and Cormier v. P.P.G. Industries, 702 F.2d 567 (5th Cir. 1983).

on certain statistical analyses. See, Watson v. Fort Worth Bank and Trust, 108 S.Ct. 2777, 2789, at n.3 (1988). These statistical analyses require that a sufficient number of employees be involved in the comparisons before they are considered reliable. Thus, smaller employers, who make promotion decisions or hiring decisions based on a small pool of applicants or current employees, will not as likely be involved in disparate impact cases which usually involve larger employers making large numbers of decisions resulting in statistically significant differences in the selection rates between minorities and non-minorities.

Another important aspect of the bill addresses the new requirement in Wards Cove that a plaintiff in a disparate impact case must identify specific parts or phases of an employer's hiring or promotion system which causes an adverse impact upon minorities, women or other protected groups. Under Wards Cove, showing that an employer's promotion or selection system as a whole severely and adversely impacts upon minorities or women is not enough to require the employer to demonstrate that the selection system is job-related and necessary. Instead, the plaintiff must dissect the employer's business practices and, somehow, isolate a particular rule, policy or practice which is creating the imbalance.

This is an impossible task in many cases. Even the Justice Department, which supported other aspects of the Wards Cove decision, did not seek such requirement. In its brief in Wards Cove, the United States conceded that multi-factor decision-making

processes can be challenged and defended as a whole. The government commented in its brief:

> "Of course, a decision rule for selection may be complex: it may, for example, involve consideration of multiple factors. And certainly if the factors combine to produce a single ultimate selection decision and it is not possible to challenge each one, that decision may be challenged (and defended) as a whole."

If Wards Cove is not modified as suggested by the bill, employers may insulate themselves from any liability despite the use of highly discriminatory selection and promotion processes. Employers may accomplish this easily. First, unless employers maintain data regarding each phase of a selection or promotion process, a victim of discrimination may never be able to collect any evidence about the discrete parts of the selection or promotion process. While federal regulations require employers to keep records regarding their selection and promotion processes and the effect of the components of the processes on the selection of employees, these regulations are not universally applicable. In fact, the employer in Wards Cove was not subject to many of these regulations. More important, there is little consequence to an employer who does not maintain the records as required.

Apart from the record-keeping problem, employers may simply adopt a totally subjective hiring and promotion system which involves evaluations by supervisory personnel at different levels. Without any standards or criteria applied at the various stages of review, there is no way to determine whether any particular part of the process is discriminatory as opposed to the overall subjective

nature of the process. Indeed, in the Watson case, the Supreme Court held that disparate impact theory could be applied to such subjective systems. Totally subjective selection and promotion processes operated by white males have been a tool of discrimination for decades. However, while the court in Watson said disparate impact analysis could apply to subjective hiring and promotion systems, the Court made its ruling meaningless by requiring plaintiffs to identify some specific practice or standard which caused the disparate impact.

It is not true that the bill will require employers to adopt quotas to avoid liability. Employers who have access to the pertinent information can break down their selection and promotion processes to determine which individual decision-makers or separate selection procedures are causing an adverse impact. These can be reviewed to see if they are truly a business necessity. If they are, they can be defended. If they are not, they should be changed.

Nor does this bill prevent employers from using some subjective review in promotion processes. It is true that, particularly for higher management positions, there may be subjective elements in evaluating employees for promotion (or hire). However, as the case law has developed over the years, there is little evidence to support a claim that no concrete standards are applicable even to higher supervisory functions. More important, it is only reasonable that if employers are to rely on a highly subjective evaluation system for making selection

decisions, there should be a reasonable burden on the employer to make sure that the system does not operate discriminatorily. As mentioned earlier, there are many ways to do this without adopting quotas.

Truly, the Griggs decision has been responsible for a large part of the progress made in the last two decades in advancing the rights of minorities and women in the workplace. Unfortunately, the United States Supreme Court has now relinquished its role in protecting those advances and moving this nation even further toward the goal of equal opportunity regardless of race, religion, or sex. We now turn to Congress, which initiated this progress in 1964 with the enactment of Title VII. The Civil Rights Act of 1990 is not just for the benefit of minorities and women. It is essential for the future of this country. As recent studies have reported, by the year 2000, the overwhelming majority of the new entrants to the labor force will not be white males. If we do not now begin to set into motion the steps necessary to be sure that minorities and woman are fully integrated into the work force, our ability to compete in the world economy in the future will be severely damaged.

The CHAIRMAN. The record will remain open until a week from today for anything to be added to it. But we are really in a bind for time here, and I want to thank all of you very much.

The committee stands in recess.

[Whereupon, at 10:47 a.m., the committee was adjourned.]

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